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In the Supreme Court of the United States

October Term, 1983

GEORGIA-PACIFIC CORPORATION,
Petitioner,

vs.

ROBERT BOYKIN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit ignored the Supreme Court's decision last term in *Pullman-Standard v. Swint* and abused its authority pursuant to Federal Rule of Civil Procedure 52(a) when it held that the District Court's factual finding of non-discriminatory intent did not rebut the Plaintiff's statistical *prima facie* case of racial discrimination?

2. Whether the United States Court of Appeals for the Fifth Circuit ignored the Supreme Court's decision last term in *Pullman-Standard v. Swint* and abused its authority pursuant to Federal Rule of Civil Procedure 52(a) when it ignored the District Court's factual findings concerning the validity of the statistical evidence and ruled that the statistics were sufficient to make a *prima facie* case of racial discrimination?

3. Whether the Circuit Court abused its discretion in reversing the District Court decision denying permanent class certification and substituting its own judgment that class certification was appropriate and mandating the same in this action.

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case.

Georgia-Pacific Corporation
International Woodworkers of America, AFL-CIO, CLC
Robert L. Boykin
Thomas R. Powell

And

All present and former black employees at the Petitioner's plant in Goss, Mississippi.

L. ARNOLD PYLE
Attorney for Petitioner

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Georgia-Pacific Corporation, your Petitioner, prays that a Writ of Certiorari issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, officially reported at 706 F.2d 1384 (1983), is printed in full as Appendix "A". The Order of the Fifth Circuit denying Petitioner's Petition for a Rehearing En Banc (not officially reported) is printed in full as Appendix "B". The Opinion of the United States District Court for the Southern District of Mississippi (not officially reported), is printed in full as Appendix "C" and "C-1".

JURISDICTION

The Judgment and Opinion of the Court of Appeals for the Fifth Circuit were entered on June 16, 1983. The Order of the Circuit Court of Appeals for the Fifth Circuit denying Petitioner's Petition for a Rehearing En Banc was entered on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE AND FACTS

An action claiming unlawful employment discrimination was brought by International Woodworkers of America (IWA) under Title VII, 42 U.S.C., § 2000(e) Et. Seq. and 42 U.S.C. § 1981 under the guise of challenging alleged racial discrimination in the employment, assignment and promotion of blacks at the Georgia-Pacific Chipping Saw Mill in rural Goss, Mississippi. The Chipping Saw Mill had been constructed and commenced operation during August, 1970, with a work force of approximately thirty-five (35) employees. Many of these initial employees were craftsmen recruited from the work forces of the contractors who built the plant or were transferred from other Georgia-Pacific facilities. It required a number of skilled and semi-skilled workmen to operate it. However, a substantial portion of the work force required were utilized in what was known as utility positions, requiring little or no education and little or no previous experience or skills. The work force increased to between sixty (60) and seventy (70) persons when running with one shift a day or to one hundred (100) to one hundred ten (110) persons when running two shifts a day up until July, 1974, after which the plant has maintained a normal full complement of em-

ployees of approximately sixty (60) to seventy (70). The evidence in the record of trial in this case fails to disclose a single instance where an employee has filed a charge with EEOC claiming to have been discriminated against because of his or her race or his or her sex. The only charge of employment discrimination was filed by an attorney representing the Labor Union, IWA, AFL-CIO, CLC. At the time of the filing of the charge by IWA claiming employment discrimination, the Union, IWA, was the NLRB certified exclusive bargaining agent of the hourly employees at the sawmill. The charge was filed July 26, 1972, during the course of an economic strike which the IWA called as part of its unsuccessful effort to obtain a collective bargaining agreement. The strike collapsed after one week. By the time the right to sue letter was issued, May 18, 1973, and this action commenced August 15, 1973, the IWA had abandoned any attempts to represent the employees of this facility. The abandonment was confirmed by a formal withdrawal of representation status on July 5, 1974. DX 29; TR at 1119-1120. Counsel for the Union arranged for the individual Plaintiffs, Robert Boykin, Thomas Powell and T. J. Gholar to join the Union as Plaintiffs in this action. All three (3) of the named individual Plaintiffs were sympathizers and among those who were out on strike at the time of the Union's efforts to obtain a collective bargaining agreement with Petitioner. None of these named Plaintiffs ever filed a charge with the EEOC claiming that he had been discriminated against in any manner as an employee at Petitioner's plant.

The initial charge of the IWA claimed discrimination in hiring, assigning and promotion of employees. After the hearing in the District Court when the evidence of the Plaintiffs themselves clearly demonstrated that Georgia-Pacific had not, at any time, practiced discrimi-

nation in its employment at the plant, the charge of discrimination in employment was dropped.

Plaintiff, T. J. Gholar, did not appeal the dismissal of his claim to the Circuit Court. The only two individual Plaintiffs with an appeal before the Circuit Court were Robert Boykin and Thomas Powell. The only alleged discrimination before the Court at this time is in the area of job assignment and job promotions.

The evidence in the record will clearly show that both Boykin and Powell had long since abandoned their employment at Petitioner's plant prior to the filing of this action.

On March 30, 1976, the District Court, Chief Judge Dan M. Russell, Jr., appointed the United States Magistrate, John M. Roper, as a special master, pursuant to F.R.C.P. 53 for the purpose of hearing the evidence presented by the parties at the liability hearing and for recommendations to the District Court for its decision.

The case was tentatively certified by the Magistrate as a class action for the purpose of discovery and the "presentation of evidence with respect to class claims."

The trial commenced on June 14, 1976, and continued for five (5) days. A transcript of thirteen hundred fifty-eight (1,358) pages was compiled recording the testimony of thirty-four (34) witnesses, including two (2) expert witnesses, one presented by the Plaintiffs, and one presented by the Defendant.

The requested findings of fact, and conclusions of law, together with legal memoranda in support thereof, were timely presented to the Magistrate by the parties. The Magistrate took the case under advisement for decision.

Many months went by and no suggested findings and conclusions had been made by the Magistrate.

On August 17, 1981, Plaintiffs' counsel filed a motion requesting Chief Judge Dan Russell to enter an order directing Magistrate Roper to prepare and file his findings of fact and conclusions of law and recommendation with the Court within forty-five (45) days. A short time prior to the date of the hearing on the pending motion, Magistrate Roper issued and filed with the Court very extensive findings of fact and conclusions of law with recommendations to the Court. He determined that the Plaintiffs had failed to prove their individual claims of discrimination and that the Plaintiffs had failed to prove classwide discrimination in Petitioner's plant and denied certification of the class as requested by Plaintiffs. (See Appendix "C").

On November 27, 1981, Judge Russell entered an order adopting Magistrate Roper's findings and conclusions as the Opinion of the Court in this action. (See Appendix "C-1").

From the Judgment of the District Court entered on November 27, 1981, two (2) of the three (3) named Plaintiffs and the IWA appealed to the United States Court of Appeals for the Fifth Circuit.

On June 16, 1983, the United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court on both legal and factual issues and determined that Georgia-Pacific was guilty of classwide racial discrimination. *Boykin v. Georgia-Pacific*, 706 F2d 1384 (5th Cir. 1983). (Appendix "A"). The case was remanded to the District Court for the sole purpose of determining whether each individual member of the class was entitled to damages.

Defendant's Petition for Rehearing En Banc was denied by Order entered by the Fifth Circuit on August 15, 1983. (Appendix "B").

Petitioner respectfully submits that the Circuit Court was apparently so concerned with the delay of the Magistrate in rendering his findings and recommendations in this case that it set out to make findings and reach conclusions of its own with little regard to the facts as reflected by the record. The attitude of the Circuit Court toward Petitioner is clearly set forth in the opening paragraph of its opinion when it wrote:

> The only thing more shocking than the racial discrimination practice by Defendant Georgia-Pacific Corporation is the unconscionable delay by the Magistrate of more than five (5) years in rendering a decision in this action. It is all too obvious that but for the Plaintiff's filing of a motion directing the Magistrate to issue a decision within forty-five (45) days, we would not yet have this case before us. 706 F2d 1384.

This statement was written in face of an abundance of undisputed facts in the record which clearly demonstrated that the Petitioner, Georgia-Pacific Corporation, a reputable American company, had made strenuous efforts and had been successful in maintaining a high profile as an equal opportunity employer since the opening of its plants, not only the Chipping Saw Mill at Goss, Mississippi, but numerous other plants throughout the State of Mississippi in the late 1960's. (See Appendix "D").

The Circuit Court, in criticizing Georgia-Pacific completely disregarded the findings of the Magistrate in his Recommendation, A33:

> The evidence before the Court presents the picture of a company attempting to establish itself as an 'affirmative action' employer since the inception of this plant. Specifically, before the plant opened, the Company made a determination to hire and maintain a

workforce with at least 30% black employees, the percentage of available blacks in the workforce in the surrounding counties. In this regard, the Defendant workforce has always been over 30% black, and usually 40% to 50% black. (TR 891-892, Exb. P-1).

Further, the Defendant instructed the Mississippi State Employment Service to refer all applicants to it on a nondiscriminatory basis. All advertisements for employees, the employee handbook, and the policy manual state unequivocally that Defendant is an equal opportunity employer. [Exb. D-22, D-5(a), (b), (c) and (d), TR 900-901]. Defendant has also posted equal opportunity notices on all bulletin boards. Further, Defendant has been very active in its support of 'cluster programs" at two predominantly black universities, and has advised all potential sources of job applicants of its program as an equal opportunity employer.

Also, the harsh criticism of Petitioner was entered and published by the Fifth Circuit, 706 F2d 1384, in complete disregard of the findings of the United States District Court for the Northern District of Mississippi in *Equal Employment Opportunity Commission v. Georgia-Pacific Corporation*, 450 F.Supp. 1227 (1977). This was an action by the EEOC represented by Commission attorneys of Atlanta, Georgia, in which all other plants, operations and entities of Georgia-Pacific Corporation in the State of Mississippi were made parties in a Title VII class action suit. The District Court there, after a full-blown hearing consuming two (2) full weeks, found that there had been no discrimination by Georgia-Pacific Corporation against its employees because of their race and/or sex and found against the Commission on all issues. The action was dismissed at the cost of the Commission, and no appeal was taken therefrom. (Appendix "D").

ARGUMENT

Petitioner prays that a Writ of Certiorari issue in this case for the following reasons:

I.

In *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) the United States Supreme Court set out the burden of proof scheme the lower courts are to follow in Title VII class action cases. The plaintiff has the initial burden of demonstrating a *prima facie* case of discrimination. The plaintiff may surmount this burden by introducing pertinent statistical information. *Id.* at 360. This statistical information may serve to demonstrate the defendant's discriminatory intent. The determination of whether a party is guilty of an intent to discriminate, as this Court recently stated, is clearly a question of fact that will not be reversed unless clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 285 (1982). Once this burden is satisfied, the burden shifts to the defendant either to discredit the plaintiff's statistics or to provide non-discriminatory reasons for the disparities. *International Bhd. of Teamsters v. United States*, 431 U.S. at 360 n. 46.

After determining that the Plaintiffs' statistical proof demonstrated a *prima facie* case of discrimination, the Fifth Circuit held that the Defendant had failed to rebut this *prima facie* case. *Boykin*, 706 F2d at 1393. The Circuit Court stated that the Defendant's "attempt to combat a *prima facie* case with evidence about a handful of promotion decisions is doomed to failure because a *prima facie* case of class-wide discrimination is not met by [Defendant's] attempts to pary specific allegations of alleged

discrimination . . ." *Id.* at 1393 *quoting United States v. Hayes Int'l Corp.*, 456 F2d 112, 120 (5th Cir. 1972). The Fifth Circuit, while correctly citing the case law, clearly is mistaken in this conclusion.

The Supreme Court has stated the following:

> [S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. *International Bhd. of Teamsters v. United States*, 431 U.S. at 340.

The District Court was aware of the vagaries of statistical evidence, and consequently made a detailed analysis of the relevancy of the Plaintiffs' statistics. It was the factual conclusion of the District Court that this statistical evidence was not reliable. The District Court, however, did not conclude its analysis at this point. The lower court also stated the following:

> The Defendant's [evidence] effectively rebut[s] any inference which the statistical exhibits of the Plaintiffs may have established. Defendant's evidence in this regard reveals that Defendant utilized proper non-discriminatory criteria in selecting individuals for employment, initial assignment and promotion. The matching of job openings to the person receiving those jobs, along with the other evidence presented, clearly reveals that race was not a factor in Defendant's selection of employees for employment, initial assignment or promotion.

In other words, the District Court determined that even if the Plaintiffs' statistics were sufficient to show a *prima facie* case of discrimination, the Defendant presented statistical and other evidence that demonstrated non-discriminatory reasons for those statistics. The Fifth Circuit cannot justifiably dispute that such evidence rebuts

the Plaintiffs' statistical case. In order to arrive at that conclusion, the District Court carefully examined and analyzed the Defendant's hiring and promotion policies with regard to the following positions: Foreman, Office Clerical and Office Manager, Saw Filer and Saw Filer Helper, Electrician, Lead Electrician and Electrician Helper, Millwright, Millwright Helper, Kiln Operator and Kiln Operator Trainee, Crane Operator, Chip-n-Saw Operator, Shipping Clerk, Machine Operator and Machine Helper, Stacker Operator, Grader and Head Grader and Diesel Mechanic. Appendix C at pgs. A44-A55. The District Court did not make a selective examination of certain promotion decisions but instead examined every possibly relevant assignment and promotion decision and determined that none were the product of racial discrimination. These were the very assignment and promotion decisions upon which the Plaintiffs' statistics were based.

In *Pullman-Standard*, this Court held that a Circuit Court should not reverse a District Court's findings of fact unless those facts were clearly erroneous. 456 U.S. at 285. The District Court in *Boykin* factually determined that the Defendant's hiring assignment and promotion decisions clearly manifested that the disparities presented in the Plaintiffs' statistics were not caused by a discriminatory motive. This factual determination rebuts the Plaintiff's statistical *prima facie* case. If a Defendant cannot rebut a statistical *prima facie* case of racial discrimination by demonstrating that each decision upon which the statistics were based was founded upon non-discriminatory factors, it would appear that a statistical case of discrimination is irrebuttable. Yet the Fifth Circuit, without reversing a single factual determination and without discussing Rule 52(a) of the Federal Rules of Civil Procedure, erroneously concluded that such evidence does not constitute a rebuttal.

Further, the Supreme Court stated in *Pullman-Standard* that a determination of whether a party is guilty of intentional discrimination is a question of fact left up to the District Court. 456 U.S. at 285. In the present case, the Fifth Circuit used statistical evidence alone to make this factual determination. Although statistics may be used for this purpose, the District Court factually found that these statistics were rebutted. In doing so the District Court was making a factual determination of discriminatory intent. Before reversing, the *Pullman-Standard* decision mandates that the Fifth Circuit determine that this factual finding is clearly erroneous. The Circuit Court did not make this determination. Consequently, it reversed the District Court improperly.

II.

If the Court is not convinced that the Defendant rebutted the Plaintiffs' statistical case, the Fifth Circuit's decision in *Boykin* is also in error because the Fifth Circuit improperly determined that the statistical evidence itself was credible.

The Circuit Court ruled initially that the Plaintiff's statistical proof was credible and sufficient to demonstrate a *prima facie* case. In doing so, the Circuit Court overruled the District Court's *factual* finding that this statistical evidence was not credible. In *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court stated that the usefulness of statistics "depends on all the surrounding facts and circumstances." *Id.* at 340. Further the Supreme Court, in *Pullman-Standard*, stated in the context of a Title VII suit that a Circuit Court is bound by the factual determinations of the District Court unless clearly erroneous. *Id.* at 285.

In *Boykin*, the District Court found the following facts that led him to conclude that the statistical evidence was

not credible. First, the statistics improperly subjectively determined which job applicant had prior relevant experience. Second, the statistics were based on surveys that ignored the fact that there were 35 positions available at the Georgia-Pacific plant. Third, the District Court determined that, given the numerous job positions, the sampling manifested in the statistics was too small to be of consequence. Fourth, having heard expert opinions from both sides, the District Court determined that the statistics did not reflect the complexity of he employment decisions. Appendix "C" at A55-A57. It was the District Court's factual conclusion that the only accurate way in which to review the Plaintiffs' charge of racial discrimination was to examine the actual hiring practice of the Defendant with respect to each job at the Mississippi plant. *Id.* at A56.

The Circuit Court ignored these findings of fact. First, the Circuit Court, without stating that the District Court's opinion was clearly erroneous, made its own finding that the statistics covered enough employees to be relevant. *Boykin*, 706 F2d at 1391. Second, the Circuit Court, citing *Fisher v. Procter & Gamble Mfg. Co.*, 613 F2d 527, 544 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981), determined that the other statistical problems uncovered by the District Court, as a matter of law, were superfluous because Georgia-Pacific made all promotion decisions based on training received at the work place. *Boykin*, 706 F2d at 1392. The District Court was aware of Georgia-Pacific's practice of training for promotion from within but believed the statistics still did not accurately reflect assignment and promotion decisions. Appendix C. This was a distinct factual finding based on factors apart from the on-the-job training practice. Once again, the Circuit Court reversed a finding of fact without demonstrating that the District Court was clearly erroneous.

The Fifth Circuit phrased its decision that the Plaintiffs' statistics were credible by stating that the District Court made certain errors of law. Actually, the Fifth Circuit overruled many of the District Court's factual determinations. If the Circuit Court did not implicitly overrule these factual determinations, the District Court's alleged legal errors would be superfluous. As the Supreme Court stated in *Pullman-Standard*, the District Court's factual determinations should not have been overruled unless clearly erroneous.

In *Pouncy v. Prudential*, 668 F2d 795 (5th Cir. 1982), the Fifth Circuit held that the statistical evidence presented by the Plaintiff, which evidence was more complete, more professionally prepared and presented and containing clear disparities in job assignments and promotions was insufficient to establish a *prima facie* case of class discrimination because of race. Petitioner asks why such a drastic change in position by the Fifth Circuit within a matter of a few months? We respectfully submit that if the statistical evidence in *Pouncy* was insufficient to establish class discrimination, the statistical evidence in this case is "doubly" insufficient. Petitioner respectfully submits that the holding of the Fifth Circuit in *Pouncy* and the holding in this case cannot amount to equal justice under the Constitution and laws of the United States.

The Circuit Court's reliance upon *Castandea v. Partida*, 430 U.S. 482, 496, 97 S.Ct. 127, 128, 51 L.Ed.2d 497 (1977), to support its conclusion that Plaintiffs established a *prima facie* case with their statistical evidence is totally misplaced. In the first instance, *Castandea* is a criminal case concerned with the selection of jurors with a fair representation of the accused's race or nationality on the grand jury. The majority opinion of this Court made it quite clear that the Court was holding that a *prima facie* case

established "since statistics showed that Mexican-Americans constituted a clearly identifiable class as to which the highly subjected 'key man' in the selection procedure was not racially neutral in view of the easy identifiability of the Spanish-Surnames and since statistics for the pertinent eleven-year period, (1962-1972), showed that although the County's population was 79.1% Mexican-American, only 39% of the persons summoned for grand jury service were in such class." In this case, we are dealing with claims of discrimination because of race in initial assignment and promotion of employees in a Chipping Saw Mill where the statistics used by the Plaintiffs had to necessarily deal with relevant past experience, job vacancy, seniority, best qualified, and other criteria which are not readily identifiable and are not reflected in the statistical tables of the Plaintiffs.

The binominal distribution statistical analysis used by the Fifth Circuit in its opinion predicated upon methodology which it states was gained from *Castandea v. Partida, supra,* for Plaintiffs' Table I and Table VI could be meaningful only if all of the elements utilized in the analysis were equal. This was forceably demonstrated by the testimony of Dr. Knox, an expert statistician witness for Petitioner. Even the Plaintiffs' expert, Dr. Henderson, had to admit that such binominal distribution statistical analysis could be meaningful only if all things were equal. Since the record clearly reflects that all things were not equal as used in the binominal distribution statistical analysis of Table I (initial assignment data) and Table VI (promotion data), the conclusions reached therefrom by the Fifth Circuit are highly improper and clearly demonstrate that the Plaintiffs did not establish a *prima facie* case with their statistical evidence in this case.

In *Castandea* this Court stated that "the State offered no evidence at all either attacking Plaintiffs' allegations of discrimination or demonstrating that his statistics were unreliable in any way." To the contrary, in this case the record clearly demonstrates that the statistical evidence submitted by the Plaintiffs was vigorously attacked by Petitioner and Petitioner's evidence showed a multiplicity of flaws which coupled with the lack of credibility of the lawyer/witness presenting the statistical evidence, led the trial court to conclude that the statistical evidence of Plaintiffs was wholly unreliable. Furthermore, if this Writ should be granted and the Petitioner given an opportunity, it can be clearly shown by the record that there was no intentional discrimination by Petitioner against any individual employee or against any class of employees at its small Chipping Saw Mill at Goss, Mississippi. Petitioner respectfully submits that the bold statement made by the Fifth Circuit in its opinion that Petitioner offered no evidence to discredit the statistical presentation made by the Plaintiffs and that no explanation was offered by Petitioner to demonstrate the non-discriminatory disparities claimed to have been shown by Plaintiffs by their statistical and other evidence is simply contrary to the facts found by the District Court. The District Court's findings are clearly and completely supported by the record in this case and should not have been reversed by the Fifth Circuit.

III.

The determination by the District Court that this action was not a proper action for certification as a class action pursuant to Federal Rules of Civil Procedure 23(a) was correct and should not have been reversed by the United States Court of Appeals for the Fifth Circuit.

The District Court properly concluded that the Plaintiffs failed to meet their burden of proof required to establish this action as a class action in two respects: (1) Plaintiffs failed to prove that there was a proper representative of the class alleged and (2) that the number of potential members of the class met the numerosity test.

The District Court concluded that the prerequisites for a class action not present in this case included a lack of a proper representative of the alleged class and the absence of proof of a sufficient number of employees affected by initial assignment and promotion to meet the numerosity test. *Garcia v. Gloor*, 618 F2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Crawford v. Western Electric Co.*, 614 F2d 1300, 1305 (5th Cir. 1980).

The Plaintiff union contended it had a right to represent a class of black employees and applicants in this action, but the Court found as a matter of fact, undisputed, that the Plaintiff Union had only engaged in negotiations for a collective bargaining agreement with the Defendant for about a three-month period in 1972, during which period there was a strike of Defendant's employees for one week in July of 1972, and that it was during this one week strike period that Mr. Youngdahl, the Union lawyer, filed a charge with EEOC; that no employee of Defendant had at any time filed a complaint of discrimination in violation of the EEOC laws and regulations; that in mid-1974, the Union withdrew its legal status as a collective bargaining representative of Defendant's employees because of lack of support. The District Court further found from the uncontroverted facts presented by the evidence that none of the individual Plaintiffs have had any contact with the Defendant plant since 1982, long prior to the time of the commencement of this action on August 15, 1973. The

District Court concluded that none of the individual Plaintiffs (originally three, now two) had had any contact with the Defendant plant since August of 1972, prior to the filing of this action on August 15, 1973. The District Court found as a matter of fact, that all of the individual Plaintiffs left their employment with the Defendant voluntarily; that the District Court further found from the facts before it that none of the three original individual Plaintiffs had been discriminated against by the Defendant because of their race. The District Court concluded that the individual Plaintiffs could not properly represent a class of applicants in a class of which they are not members. *East Texas Motor Freight v. Rodrigues*, 431 U.S. 395 (1977). The District Court further concluded that the interest of a sub-class of applicants represented by the individual Plaintiffs are antagonistic to that of employees seeking higher positions at the Defendant's plant. The District Court further found that there was no evidence presented to the Court that any applicant had ever been a member of the Plaintiff Union. The District Court further found that there was a complete absence of evidence in the record regarding sufficient numerosity to constitute the need for the maintenance of this case as a class action. The District Court concluded that the evidence before the Court did not reveal any employee, other than perhaps Boykin and Powell "who had ever been members of the Plaintiff Union"; the Court concluded that the relatively few individuals who appeared in the Court testifying concerning alleged discrimination on the part of the Defendant in initial assignment or promotion could easily have maintained an individual action in regard thereto. (Appendix "C" A61-A63).

In spite of the District Court's thorough consideration of the facts before it, the Fifth Circuit, using a distorted

version of the facts established by the record and as considered by the District Court, such as the delay between the conclusion of the trial and the submission by the Magistrate of his findings of fact and conclusions of law, as the period in which the individual Plaintiffs had not had contact with the Defendant's plant was clear error on the part of the Circuit Court. The District Court's findings in this regard very explicitly related to the time period from the voluntary termination of each of the individual Plaintiffs to the time of the filing of this action.

The Fifth Circuit took the position that the reliance by the District Court upon *Rodrigues* was misplaced because "prior qualifications are irrelevant in this case, the two cases are not analogous." In making its determination as to the appropriateness of a class action in this case, the Fifth Circuit was obviously confused in dealing with the number of total employees who had at one time or another been on the payroll of the Defendant, which number could have been concerned only with a question of discrimination in employment which had long since been abandoned by the Plaintiffs. The question before the Court was whether or not there had been discrimination in initial assignment and/or promotion. We submit that the District Court was fully justified in concluding from the facts before it that prior qualifications were a prerequisite to consideration in the making of assignments and the promotion of employees by the Defendant. The Fifth Circuit was clearly in error in reversing the United States District Court on this issue. See also *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 72 L.Ed.2d 740, 749 (1982) and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 216.

CONCLUSION

The Fifth Circuit's decision in *Boykin* is clearly an emotional response to the Magistrate's five year delay in bringing this case to resolution. In its haste to remedy a perceived miscarriage of justice, the Fifth Circuit has overstepped its statutory duty to overturn findings of fact only when clearly erroneous. Further, it has ignored the teachings of the Supreme Court's decision in *Pullman-Standard*. For these reasons, and the reasons stated above, Petitioner respectfully submits that its Petition for a Writ of Certiorari in this action should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, first-class, postage prepaid, this the 11th day of November, 1983, to the following named counsel of record for Respondents:

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APPENDIX

APPENDIX "A"

Robert BOYKIN, et al., Plaintiffs-Appellants
Cross-Appellees,

v.

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellee Cross-Appellant.

No. 81-4521.

United States Court of Appeals,
Fifth Circuit.

June 16, 1983.

In an employment discrimination case, magistrate's recommendations, adverse to plaintiffs in all respects, were adopted by the United States District Court for the Southern District of Mississippi at Hattiesburg, Dan M. Russell, J. On appeal by the plaintiffs, the Court of Appeals, Garza, Circuit Judge, held that: (1) requirements for class action certification were met; (2) plaintiffs' statistical evidence made prima facie case which was not rebutted; and (3) claims were not barred by limitations.

Reversed and remanded.

1. Federal Civil Procedure (Key) 184

Where total of jobs at issue in racial discrimination case was only about 20, but contours of class encompassed all present and past black employees, of whom there were 317, all of whom had a stake in the claim, numerosity

requirement for tentative certification of class action was met. Fed. Rules Civ.Proc.Rules 23, 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Federal Civil Procedure (Key) 175

Where five-year delay of magistrate in deciding case made time span between employment and final resolution of employment discrimination claims so large, class certification was improperly denied on the ground that "none of the individual plaintiffs have had any contact with the defendant plant since August of 1972." Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights (Key) 44(4)

In an employment discrimination case, statistical evidence presented by plaintiffs at trial made prima facie case of racial discrimination in respect to assignments and promotions, and employer was bound to come forward with evidence either discrediting such statistical presentation or providing nondiscriminatory explanation for the result. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights (Key) 44(4)

Where unskilled persons are hired and then promoted on basis of training received on the job, disparity between number of whites and blacks promoted is significant, and it is unnecessary to standardize data for qualifications where jobs do not involve skills not generally possessed or readily acquired by general population. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights (Key) 44(1)

Prima facie case of racial discrimination in employment cannot be met by attempts to parry specific allegations of alleged discrimination, but, rather, to combat case of classwide discrimination based upon statistical evidence, defendant must either show flaws in plaintiffs' statistics or provide nondiscriminatory explanation for result, which burden will not be met by general assertions of good faith or of hiring only best applicants. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights (Key) 40

Statute of limitations applicable in employment discrimination case was six-year Mississippi catchall statute. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Miss.Code 1972, §§ 15-1-29, 15-1-49; 42 U.S.C.A. § 1981.

Danny E. Cupit, Jackson, Miss., James E. Youngdahl, Little Rock, Ark., Richard B. Sobol, Washington, D.C., for plaintiffs-appellants cross-appellees.

L. Arnold Pyle, William A. Pyle, Peyton S. Irby, Jr., Jackson, Miss., for defendant-appellee cross-appellants.

Appeals from the United States District Court for the Southern District of Mississippi.

Before GARZA, POLITZ and JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

The only thing more shocking than the racial discrimination practiced by defendant Georgia-Pacific Corporation is the unconscionable delay by the magistrate of more than five years in rendering a decision in this action. It is

all too obvious that but for the plaintiffs' filing of a motion directing the magistrate to issue a decision within forty-five days, we would not yet have this case before us. Five days prior to a hearing on said motion, the magistrate finally issued his recommendation, which was adverse to plaintiffs in all respects. That opinion was adopted by the district court. For the reasons stated herein, we reverse that opinion and remand the case to the district court where it hopefully will receive more expeditious treatment than it has heretofore.

FACTS

This class action was brought under Title VII, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 to challenge alleged racial discrimination in the initial assignment and promotion of blacks at the Georgia-Pacific chip-n-saw mill in rural Goss, Mississippi.[1] A chip-n-saw mill is a modern facility designed to produce finished lumber from raw timber. This plant opened in 1970 and, depending on whether it operated on one or two shifts a day, employed either between sixty to seventy persons or 100 to 110 persons.

The EEOC charge in this case was filed in July of 1972 by the International Woodworkers of America (IWA). A right to sue letter was issued to the IWA in July of the following year and the complaint was filed shortly thereafter. At the time the lawsuit was filed, the IWA was certified by the National Labor Relations Board as the exclusive bargaining agent for the plant employees. The individual plaintiffs did not file EEOC charges, but instead relied on that filed by the union.

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1. The original complaint included a claim of discriminatory hiring practices which has not been pursued in this appeal.

The EEOC charge was filed by the union during the pendency of a strike called to protest the inability of the union to secure a collective bargaining agreement with the defendant. The union was never successful in this regard. In 1974, it withdrew its representational status but has not ceased, in the magistrate's words, "to vigorously pursue this particular lawsuit." Record on Appeal, vol. 5 at 656.

The named plaintiffs in this action are two black men who were employed at the chip-n-saw mill until mid-1972. It is clear that defendant was willing to hire blacks at its plant; although the area labor force was approximately thirty percent black, often fifty percent of the plant's work force was black. What is at issue, however, is the quality of the jobs which these individuals were allowed to fill. The chip-n-saw mill is organized into five departments—Log Yard Department, Sawmill Department, Rough Lumber Manufacturing Department, Planer Mill Department and Shipping Department. Within each department, there are various job classifications. The bottom rung of the employment ladder is a classification called "utility," which is where most blacks, including the named plaintiffs, both began and ended their employment.

Plaintiff Robert Boykin was assigned to utility despite the fact that he had a great deal of relevant prior experience. He had previously worked in a plant that manufactured wood products and had received vocational training as a diesel mechanic. After his initial assignment, he repeatedly requested promotions from his supervisor, but his appeals were to no avail. In January of 1972, a white employee who had just completed probation was given the position (forklift operator) that Boykin had been seeking. Plaintiff Thomas Powell also completed his two years of work at the plant as a utility. He had fifteen

years of prior experience at a furniture plant but was still unable to secure a promotion.

The initial assignment of new employees at the plant was made by the plant manager or plant superintendent. Promotion decisions, on the other hand, were delegated to the foreman of the department that experienced a vacancy, but the plant superintendent retained veto power over the foreman's choice. The management did not post notices of vacancies within departments. Neither did it have any written procedures regarding the filling of vacancies until long after this action was filed. Plaintiffs contend that racial discrimination prevented blacks from initially receiving or indeed ever receiving the good jobs at the plant.

In order to prove their contentions, plaintiffs presented a battery of statistical evidence designed to show racial discrimination from the disparities between percentages of blacks and whites who received favorable initial assignments and promotions. In addition, plaintiffs bolstered their statistical case by presenting evidence concerning individual employment decisions, both (1) evidence from black witnesses about their inability to secure preferable assignments, and (2) evidence of the preferences shown to white employees, notably preferences given to whites who were family or friends of the upper level plant personnel.

CLASS CERTIFICATION

The first prong of plaintiffs' attack upon the lower court judgment is aimed at the denial of class certification. The action was tentatively certified as a class action in 1974, with a final decision reserved until after trial. When the magistrate finally issued his recommendations in 1981, he denied class certification for two reasons. First, he held that the number of persons involved was not great enough

to meet the numerosity requirement of Fed. Rule Civ. Pro. 23(a).[2] Second, he held that the claims of the individual plaintiffs were stale since they had not been involved with the Georgia-Pacific plant since 1972.

[1] In order to determine whether the numerosity requirement was indeed met, we must examine the exact boundaries of the class. At the time of tentative class certification, the class was identified as all past, present and prospective black employees and all unsuccessful applicants for employment at the sawmill. Since the hiring claim has not been pursued upon appeal, that portion of the class must be eliminated. The claims of present and past black employees are raised in this appeal. Therefore, a class of 317 individuals remains. Certainly, a class of this magnitude is large enough to meet the numerosity requirement.

Defendant claims that the class includes fewer than twenty individuals. This number was calculated by determining the number of promotions which could have occurred during the relevant period (69) and then assuming that blacks were hired at a rate equal to their participation in the labor force (approximately 30%). The total number of jobs at issue is only approximately twenty, a number much too small to meet the numerosity requirement. However, this argument ignores the fact that the contours of this class encompass all present and past black employees. This is a case where employees were *not* promoted.

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2. Federal Rule of Civil Procedure 23(a) provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

All 317 individuals have a stake in that claim. There is no way to limit the action to twenty persons, as defendant suggests, because it is impossible to identify those persons who would have been hired but for the discrimination which occurred.

[2] The magistrate also denied class certification because, in his words, "none of the individual plaintiffs have had any contact with the defendant plant since August of 1972." Record on Appeal, vol. 5 at 679. The relevant consideration for purposes of Rule 23, however, is not length of absence from the plant but willingness and ability to litigate the issues on behalf of the class. The plaintiffs shall not be penalized for the five year delay of the magistrate in deciding this case which makes the time span between employment and final resolution so large.

The magistrate's recommendation also refers to *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), as support for its holding that the individual plaintiffs are not proper class representatives. Reliance upon that case is misplaced. In *Rodriguez*, the plaintiffs were judged improper class representatives because there were objective qualifications standards that they did not meet. Since prior qualifications are irrelevant in this case, the two cases are not analogous.

VALIDITY OF THE STATISTICAL EVIDENCE

The validity of statistical proof as a means of proving a prima facie Title VII case has long met with acceptance in the courts. *E.g.*, *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); *McDonnell Douglas Corp.*

v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (1980), *vacated on other grounds*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir.1980), *cert. denied*, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979).

This class action was brought to remedy "pervasive resistance to the principles of equality of treatment and opportunity in the workplace articulated in Title VII." *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 (5th Cir. 1982). The battery of statistical evidence which was presented does show that a significantly smaller percentage of blacks are initially assigned to a classification other than utility. Likewise, a much smaller percentage of blacks are ever promoted to higher positions and those who are promoted must wait much longer for this opportunity than their white counterparts.

The following is a summary of the statistical evidence presented by plaintiffs at the trial of this case:

Table I

Number and Percentage by Race of Employees Whose Initial Assignment Was Not to the Utility Position

Race	Total Number Employed	Number Not Initially Assigned to Utility	Percentage Not Assigned to Utility
White	444	90	20.3%
Black	317	22	6.9%

Table II

Number and Percentage by Race of Employees Who Had Relevant Prior Experience and Whose Initial Assignment Was Not to the Utility Position

Race	Number with Relevant Prior Experience	Number Not Initially Assigned to Utility Position	Percentage Initially Not Assigned to Utility
White	184	61	33.2%
Black	107	13	12.1%

Table III

All-White Job Classifications

Job Classification	Number of Whites Assigned
Saw Filer	4
Saw Filer Helper	6
Lead Electrician	1
Electrician	7
Electrician Helper	5
Millwright Carpenter	2
Millwright/kiln Operator	2
Kiln Operator	4
Kiln Operator Trainee	4
Crane Operator	3
Chip-n-saw Operator/Millwright	2
Chip-n-saw Operator	11
Chip-n-saw Trainee	3
Shipping Clerk	4
Machine Operator	5
Stacker Operator	6
Diesel Mechanic	6
Diesel Mechanic Helper	1
Total:	78

Table IV

Average Wage of Employees in the Work Force on 2/11/76 by Race by Year of Hire

	Whites		Blacks		
Year of Hire	Number	Average Wage	Number	Average Wage	Difference: White Wage-Black Wage
1970	5	$3.88	6	$2.99	$0.89
1971	3	3.90	2	2.82	1.08
1972	5	3.11	3	2.75	0.36
1973	4	3.55	3	2.91	0.64
1974	2	3.43	2	2.78	0.65
1975	10	3.59	11	2.77	0.82
1976	2	2.65	7	2.65	0.00

Table V

Average Wage of Employees in Work Force on 2/11/76 by Race, by Experience

	Whites		Blacks		
Experience	Number	Average Wage	Number	Average Wage	Difference: White Wage-Black Wage
With prior experience	16	$3.77	17	$2.86	$0.91
With *no* prior exp.	16	3.21	16	2.73	0.48

Table VI

Number and Percentage by Race of Non-probationary Employees Whose Initial Assignment Was In the Utility Position and Who Were Promoted Above Utility

Race	Number of non-probationary employees whose initial assignment was in Utility	Number who were promoted out of Utility	Percentage who were promoted out of Utility
White	178	84	47.2%
Black	157	42	26.8%

Table VII

Average Number of Months by Race to Promote Out of Utility

Race	Number who were promoted above Utility	Average number of months
White	95	3.3
Black	40	3.7

Table VIII

Number and Percentage by Race of Non-probationary Employees with Prior Experience Whose Initial Assignment was in the Utility Position and Who Moved Above the Utility Position

Race	Number of non-probationary employees with prior experience whose initial assignment was in the Utility Position	Number who Were Promoted Out of Utility	Percentage who Were Promoted Out of Utility
White	68	36	52.9%
Black	61	19	31.1%

Table IX

Average Number of Months by Race by Experience to Promote Out of Utility

Race/ Experience	Number who were promoted to jobs paying more than Utility	Average number of months
whites with prior experience	37	3.9
whites with *no* prior experience	50	3.0
Blacks with prior experience	18	8.1
Blacks with *no* prior experience	22	11.1

Plaintiffs' Brief at 10, 12-16.

The Supreme Court, in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), held: "Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." 433 U.S. at 307-08, 97 S.Ct. at 2741. Although proof of discriminatory motive is generally required in disparate treatment cases, the evidence of subjective, standardless decision-making by company officials, which is a convenient mechanism for discrimination, satisfies this requirement. *See Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir.1972). The company, after all, made no provision for informing employees of promotion opportunities nor did it establish any objective bases for judging the possible applicants. The explanation of plant manager Bobby Thornton for the scarcity of blacks in upper level jobs demonstrates the prejudice which must have entered into the decisions he made:

> . . . their own choice, a whole lot—a lots of cases, it's their own choice as well as their experience, in other words, what probably I'm trying to say is our better jobs as far as less physical work and responsibility and what have you is in our semi-skilled jobs, they have less responsibility. It's usually an easier type of job, less physical work such as debark operator has a cushion he sits on all day, and he's got buttons to push, he has to know which button to push at which time, but it's a much easier job than a millwright. A millwright's job—he has to get down in the grease and the grit and grind and everything that he does is physically hard plus he has to have the knowledge and the skill to do his job as quickly as possible to get the mill back in production and most of these people that you're talking about—this class of black people are satisfied

> with a semi-skilled job. . . . [T]hey're contented more so in a semi-skilled job than taking on the responsibility and extra hard work and long hours that maintenance requires.

Plaintiffs' Exhibit 41 at 53.

Plaintiffs' reliance on statistical evidence to prove a prima facie case of racial discrimination requires us to judge the statistical significance of the disparities charted above. Fortunately, the methodology to be utilized in arriving at this answer is clearly set out in *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977). A binomial distribution statistical analysis of Tables I (initial assignment data) and VI (promotion data) demonstrates the statistical significance of the difference between the actual and expected number of blacks who received favorable initial assignments/promotions[3]

[3] In order to rebut this prima facie case of racial discrimination in employment, the defendant must come

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3. The binomial distribution statistical analyses were computed as follows:

BINOMIAL DISTRIBUTION FOR TABLE I

Total Number in Pool	=	444 + 317 = 761
Percentage of Blacks	=	41.7%
Percentage of Whites	=	58.3%
Total Number Not Assigned to Utility (sample)	=	90 + 22 + 112
"Expected" Number of Blacks	=	41.7% of 112 = 47
Actual Number of Blacks	=	22
Difference	=	25
Standard Deviation	=	$\sqrt{112 \times .417 \times .583} = 5.2$
Number of Standard Deviations	=	25/5.2 = 4.8

(Continued on following page)

forward with evidence which either discredits the plaintiffs' statistical presentation or, in the alternative, provides a non-discriminatory explanation for the result. There is no dispute with the numbers listed in the tables printed below. Defendant, however, did present a number of challenges to the statistical proof offered by plaintiffs, which were adopted by the magistrate. First, defendant contended that the number of employees involved is too small to permit statistical evaluation of disparities in assignment and promotion. Defendant understates the size of the work force by maintaining that what is really involved here is simply a work force of sixty to seventy workers when the plant operated on one shift and 100 to 110 workers when the plant increased its operation to two shifts a day. A closer look at the exhibits presented by plaintiffs reveals that the initial assignment table considered the assignment of 761 employees and the promotion table considered 335 non-probationary employees. This suit involves, after all, a charge of continuing racial discrimination over a number of years; there is no merit to the proposition that at most 110 employees should be considered. This is irrelevant, however, because the dis-

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Footnote continued—

BINOMIAL DISTRIBUTION FOR TABLE VI

Total Number in Pool	=	178 + 157 = 335
Percentage of Blacks	=	46.9%
Percentage of Whites	=	53.1%
Total Number Promoted (sample)	=	84 + 42 = 126
"Expected" Number of Blacks	=	.469 x 126 = 59
Actual Number of Blacks	=	42
Difference	=	17
Standard Deviation	=	$\sqrt{126 \times .469 \times .531}$ = 5.6
Number of Standard Deviations	=	17/5.6 = 3.04

positive point here is that the significance of the statistical data is shown by the test approved in *Castaneda* and *Hazelwood*.

The second basis upon which the court found the statistical evidence inadequate was the failure to standardize the data for qualifications. In determining the qualifications of employees, plaintiffs utilized all information listed on the individuals' employment applications.[4] This is insufficient, according to defendant, because a number of witnesses testified in court about additional qualifications.

Although the defendant stressed the need for highly qualified individuals in many of the jobs at the plant, the plant manager testified that only one job required a skilled employee. The other jobs could be learned at the plant, in his opinion.

> Q. On that same issue, it is also true that any job at your plant can be learned and has been learned at the plant?
>
> A. That's true.
>
> Q. There's no job, is there, for which—some companies simply will not hire people into a certain job unless they have had certain types of experience elsewhere? That is not the case at your plant.

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4. Plaintiffs' exhibits considered the following types of experience relevant for jobs at the chip-n-saw mill:

1. work in a sawmill;
2. work in a logging or pulpwood operation;
3. work in a wood products or paper mill;
4. work at the New Orleans Furniture Company (a local business in either the mill department, the woodworking department or in a saw operator classification;
5. work in a craft represented at the sawmill;
6. work as an operator of the type of heavy equipment found at the plant.

A. That's not the case at this plant.

Q. And, in fact, every single one of these jobs that you've been talking about today have been learned by employees who have had no relevant prior experience, isn't that true?

A. No.

Q. Give me a list of the jobs at the Columbia sawmill that have not been learned by employees at the job but which have always been filled by persons who came with the necessary skills.

A. The lead electrician job has never been filled by a person.

Q. Are there others?

A. I can't think of any.

Record on Appeal, vol. 10 at 983-84.

[4] The plant manager stated that the company had adopted a policy of promoting to upper level positions on the basis of training received at the plant.[5] It is

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5. The plant manager presented the following evidence about the way by which individuals progress to higher paying, more responsible jobs:

> Well, most of these particular people right here that move through this plant from one job to another learn the fundamentals and learn how to operate this particular type of equipment at times whenever they always have an opportunity to watch and observe and just, say, for a few moments at a time run these particular types of equipment. And usually they let it be known by doing this type of thing or talking to their foreman about they want to learn to run so and so, whichever type of equipment it is. And they are made available when the operator is off for a day or some situation like that. These people have an opportunity to fill in and to learn how to operate this different equipment. And I think I could apply this to any job that we have. If a man wanted to and showed that he has initiative to learn and has ability to do the job, I believe he could promote to any one of those jobs, to any other job that he wanted to.

Record on Appeal, vol. 10, at 943.

the rule in this Circuit that where unskilled persons are hired and then promoted on the basis of training received on the job, a disparity between the number of whites and blacks promoted is significant. It is unnecessary to standarize the data for qualifications.

> The Company's entry level hiring policy is a distinctive circumstance in this case supporting the inference of discrimination. When a company adopts a policy and practice of hiring in at low-level unskilled jobs and promoting to upper-level [positions] based upon training received and skills developed at the plant itself, it cannot convincingly challenge the *prima facie* showing under the *Hazelwood* "qualifications" dicta. Where skills are commensurate with company training, we will approve statistical comparisons between racial make-up in key positions and racial composition in the total work force. See, *James v. Stockham Valves*, [559 F.2d 310] at 341 [(5th Cir.1977)]; *Scott v. City of Anniston*, [597 F.2d 897] at 901 [(5th Cir.1979)].

Fisher v. Procter & Gamble Mfg. Co., 613 F.2d at 544.

Defendants points to a line of cases in which the failure to standardize data for qualifications was judged fatal to the plaintiffs' statistical case. *E.g., Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir.1982); *Rivera v. City of Wichita Falls*. Unlike the case at bar, however, those cases considered jobs involving skills not generally possessed or readily acquired by the general population. The Supreme Court, in *Hazelwood School District v. United States*, set forth the reason that the two types of cases must be viewed differently.

> In Teamsters, the comparison between the percentage of Negroes on the employer's work force and the

> percentage in the general areawide population was highly probative, because the job skill there involved —the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

433 U.S. at 308 n. 13, 97 S.Ct. at 2742 n. 13. Since the plant manager plainly stated that all but one of the jobs could be learned on the job, this case certainly corresponds to the line of authority represented by *Fisher v. Procter & Gamble Mfg. Co.*, and qualifications need not be considerd in making an accurate statistical picture.

[5] The final reason for rejection of the statistical evidence was defendant's presentation of evidence about a few of the promotion decisions and why blacks were not placed in these positions. This attempt to combat a prima facie case with evidence about a handful of promotion decisions is doomed to failure because a prima facie case of class-wide discrimination "is not met by [defendant's] attempts to parry specific allegations of alleged discrimination . . . ." *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir.1972). Defendant contends that its articulation of allegedly legitimate reasons for some promotion decisions should work to shift the evidentiary burden back to plaintiffs to demonstrate that the proffered reasons are a pretext for discrimination. However, the burdens of proof and production set out in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1982), apply only to individual disparate treatment cases. In order to combat a case of class-wide discrimination based upon statistical

evidence, defendant must either show flaws in the plaintiffs' statistics or provide a non-discriminatory explanation for the result. This burden will not be met by general assertions of good faith or of hiring only the best applicants. *Teamsters v. United States*, 431 U.S. at 342, n. 24, 97 S.Ct. at 1858 n. 24.

In addition to the reasons adopted by the court below, the defendant urges that the statistical evidence should be discounted because the exhibits impermissibly mixed conduct for which liability might attach and conduct barred by the limitations period.

This court has recently reaffirmed in *Rivera v. City of Wichita Falls*, that the standards for judging claims of pattern or practice employment discrimination under Title VII and Section 1981 are identical. 665 F.2d at 534 n. 4. Therefore, the plaintiffs' case is not adversely affected as long as the incidents upon which the statistical evidence is built fall within one of the limitations periods. Defendant reasons that the applicable statute of limitations governing this case is the Mississippi three years statute, Miss. Code Ann. § 15-1-29 (1972). Since some of the individuals whose employment history was reflected in the tables were hired shortly outside this limitations period, the defendant argues for the rejection of the entire battery of statistical evidence.

[6] Although correct in its judgment that unlawful conduct which has not been made the subject of a timely charge is, in the words of the Supreme Court, "merely an unfortunate event in history which has no present legal consequences," *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977), the defendant is incorrect in his assumption that the rule works to the plaintiff's detriment in this action. This

Court has held that the statute of limitations applicable to Section 1981 claims is the six year Mississippi catch-all statute, Miss.Code Ann. § 15-1-49 (1972). *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 815 (5th Cir.1982), *cert. denied* ..... U.S. ....., 103 S.Ct. 451, 74 L.Ed.2d 605 (1983); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 528 (5th Cir.1980). The limitations period reaches more than two years before any of the hiring at this plant occurred. Accordingly, we find that all statistical material presented by plaintiffs may properly be considered.

CONCLUSION

Regrettably, we cannot bring this case to final resolution today. We do, however, lay the groundwork which should enable the court below to finish this task in short order.

First, we reverse the court's denial of class certification and instruct the court below to certify plaintiffs Boykin and Powell as class representatives for both the initial assignment and promotion claims. Secondly, we reverse the court's judgment on the liability issue and order the district court to enter judgment for plaintiffs on both the initial assignment and promotion claims. The entry of judgment for plaintiffs on their claims of class-wide discrimination brings this case into Stage II. *See Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 443-44 (5th Cir.1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed. 2d 308 (1975). *See also James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-59 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). A notice must be sent to each member of the class informing him of his entitlement to make a claim. The named plaintiffs, as every other black employee in the class, are entitled to the presumption that arises from the finding of

discrimination and should be entitled to make a claim for back pay and other relief.

Finally, the finding of past discrimination makes appropriate the examination of defendant's present practices in order to evaluate the propriety of granting injunctive relief. We are unable to perform this task on a record that includes no information after the 1976 trial of this case; we, therefore, remand this issue for the district court to undertake this inquiry.[6]

REVERSED AND REMANDED.

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6. As a point of cross-appeal, defendant argues that the magistrate improperly denied its motion for attorney's fees. In Title VII cases, attorney's fees will be awarded where the action is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Defendant maintains that the action was brought in bad faith and that attorney's fees are consequently mandated. The foregoing discussion of this case makes it very clear that this is a legitimate action. The reversal of the magistrate's decision on the merits clearly precludes us from awarding attorney's fees to the defendant.

APPENDIX "B"

(Filed August 15, 1983)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4521

ROBERT BOYKIN, ET AL.,
Plaintiffs-Appellant
Cross Appellees,

versus

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellee
Cross Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06/16/83, 5 Cir., 198.., ... F.2d .....).

(August 15, 1983)

Before GARZA, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX "C"

(Filed August 27, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. 73H-64(R)

ROBERT BOYKIN, et al
PLAINTIFF

vs.

GEORGIA-PACIFIC CORPORATION
DEFENDANT

RECOMMENDATION

This suit was filed by the named Plaintiffs in their individual capacities, as well as representatives of other blacks, seeking redress for allegedly unlawful employment practices at the Defendant's sawmill in Columbia, Mississippi, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*, and Section I of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

In their complaint the Plaintiffs allege that the company has intentionally engaged in policies and practices made unlawful by Section 701 of Title VII; and that such unlawful employment practices include, inter alia, the following: (a) initially assigning Plaintiffs Boykin, Gholar, and Powell to utility positions because of their race; (b) failing to promote the Plaintiffs Boykin, Gholar, and Powell from the utility position, because of their race; (c) terminating the employment of Plaintiffs Boykin and Powell because of their race; and (d) discriminating against blacks

as a class in initial hiring, assignments and promotions because of race.

The Plaintiffs seek (a) permanent injunctive relief enjoining the Defendant from continuing to engage in acts and practices which discriminate against black employees and black applicants for employment and requiring the Defendant to offer each future promotion to the black employee with the highest plant-wide seniority until such time as blacks occupy each position in the plant, including supervisory positions, in approximately the same proportion as the total number of black employees bear to all the plant's employees, and thereafter to implement a system for promotions which will assure that black and white employees are given equal opportunity for promotion regardless of race; (b) grant to Plaintiffs and the members of the class they represent, back pay and other wage supplements to redress discriminatory job assignments; (d) [sic] require the Defendant to reinstate the named Plaintiffs with plant-wide seniority from their first employment with the company to the date of reinstatement; and (d) award the Plaintiffs the cost of this action, including reasonable attorneys' fees in accordance with Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2003(k).

The Defendant contends that the Plaintiffs have failed to meet their burden of proof as to any of the allegations of employment discrimination; that the Plaintiffs have failed to prove by a preponderance of the evidence that the Defendant has intentionally engaged in any racially discriminatory employment practices; and that the Plaintiffs have failed to prove the existence of any damage to any black individual or class of black individuals. The Defendants [sic] further state that the Plaintiffs have failed to prove a prima facie case through their statistical exhibits and witnesses; that assuming *arguendo* that the Plaintiffs

have proved a prima facie case, the Defendants [sic] detailed summaries and oral testimony rebutted the Plaintiffs' case and whatever inferences may have been established; and that the Plaintiffs failed to come forward with further proof to refute the Defendant's evidence. Further, the Defendant alleges in its own counterclaim that the Plaintiffs only filed the present cause of action to promote the union at the expense of the company and its employees.

The issues as presented by the parties at trial and as summarized in the post trial briefs are as follows:

1. Whether the Plaintiffs may maintain this suit pursuant to 42 U.S.C. § 2000e *et seq* since the Plaintiffs violated 29 C.F.R. 1601.6.

2. Whether this suit should be maintained as a class action.[1]

3. Whether the Defendant has engaged in unlawful employment practices at its plant in Marion County, Mississippi in the hiring, initial assignment, and promotion practices which have been used to discriminate against the named Plaintiffs, as well as class members because of their race.

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1. An order has been entered herein by the District Court wherein it was found that

> "pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, this cause is tentatively certified as a class action for purposes of the completion of plaintiffs' discovery and the presentation of evidence with respect to class claims at the hearing on liability, ... This Order with respect to class certification is conditional, as provided for in Rule 23(c)(1), and the Court will issue its final ruling on the issue of class representation following the hearing on liability.
>
> The class thus tentatively certified as defined to include all past, present and prospective black employees and all unsuccessful black applicants for employment at the Columbia, Mississippi sawmill of Defendant Georgia-Pacific Corporation."

4. Whether any injunctive relief should be granted against the Defendant and, if so, the nature of the said relief.

5. Whether any further hearing is necessary to determine if any individual or class or individuals is entitled to back pay or damages.

FINDINGS OF FACT

I.

This is a class action suit instituted by individuals and a labor organization which seeks to enjoin and redress for alleged violations of the rights of black employees of the Georgia-Pacific Corporation in Columbia, Mississippi, as secured pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* and by Section I of the Civil Rights Act of 1866, 42 U.S.C. § 1981. In addition, the named Plaintiffs seek affirmative relief including promotion, reinstatement, back pay, and other wage supplements for themselves and for the members of the class they represent that will redress any alleged acts of discrimination which might have occurred against them and prevent any alleged perpetuation of its effects. Jurisdiction is alleged in this case under Section 706(f)(3) of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(f)(3) and by 28 U.S.C. Section 1343(4).

II.

The named Plaintiffs are black citizens of the United States and of the State of Mississippi. The Plaintiff, International Woodworkers of America, AFL-CIO, CLC (union is an unincorporated organization with central offices in Portland, Oregon. Prior to and at the time of the filing of the said lawsuit, the Plaintiff union was the col-

lective bargaining representative for a unit of production and maintenance employees at the Columbia, Mississippi plant of the Defendant, Georgia-Pacific Corporation (company). The union is a labor organization within the meaning of Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Plaintiffs filed this action on behalf of themselves and a class of persons composed of all black employees of the Defendant company, all former black employees of the Defendant company, and all black persons who have applied for employment with the Defendant company, but who have been refused such employment because of race.

III.

The Defendant is a corporation qualified to do business in the State of Mississippi. It operates a number of plywood, particle board, sawmill and chemical operations throughout the rural areas of this State. The specific plant involved in this suit is a highly mechanical wood processing plant known as a chip-n-saw mill in rural Marion County, Mississippi, approximately eight miles north of the town of Columbia, Mississippi. The Defendant's work force comes primarily from individuals residing in Marion and Jefferson Davis Counties. The total number of persons in the labor force in these two counties during the time in question was approximately 11,133 individuals, 3,368 of whom were black. Accordingly, blacks constitute 30.25% of the labor force available to the Defendant. (Exb. D-3)

IV.

The Defendant plant is an automated chip-n-saw mill utilized primarily for producing finished pine lumber. It was only the second mill of this type in the State of Mississippi and the first such mill operated by the De-

fendant. The plant began production in August, 1970 with a work force of approximately 35 employees. The initial supervisory staff, with one exception, was brought to the mill from other sawmills or construction companies outside the surrounding area. The Defendant plan originally utilized a two-shift operation employing approximately 100 to 110 persons until July 1974 when layoffs became necessary due to economic conditions. The plant continued to cut back on employees in late 1974 and early 1975 and was closed for production for approximately six months until it reopened in June of 1975. From July of 1974 to June of 1976 the work force consisted of approximately 60 to 70 employees. This is the normal employee complement for a one-shift operation. Between the opening of the plant in 1970 and 1976, the Defendant employed approximately 783 workers at the Columbia plant, 460 whites and 323 blacks. This has resulted in an overall hiring policy during the pertinent period of 41.5% black.

V.

The impetus for this lengthy litigation emerges from union activities dating back to 1972. In February of that year, the Plaintiff union won an election at the plant and bargained for a collective bargaining agreement beginning in late April, 1972. The union ultimately called a strike against Defendant on July 7, 1972, which lasted for one week. Approximately 45 to 50 employees went out on strike and the Defendant hired 32 to 35 new employees during this period. All but one of the striking employees was black.

During the pendency of this strike, counsel for the Plaintiff's union, Mr. James Youngdahl, signed and forwarded a sworn charge to the Equal Employment Oppor-

tunity Commission on July 12, 1972, alleging unlawful employment practices as follows:

> Black employees have been denied opportunities for promotion, transfer, and other vacancy filling movement, denied back pay and front pay to which they were entitled because of present discrimination generated by years of service under racially discriminatory conditions, and otherwise have been discriminated against with respect to their compensation, terms, conditions and privileges of employment because of their race and/or color.

This charge did not contain the name, address and telephone number of any aggrieved person. Nor is there any evidence that the E.E.O.C. verified the authorization of the union to file this charge. The Plaintiffs, Robert Boykin, Jr., Thomas Powell and T. J. Gholar have never filed a charge with the E.E.O.C. nor have they talked to any of the E.E.O.C.'s investigators. There is no evidence before the Court that these named Plaintiffs are now members of the Plaintiff union. Further, there is no credible evidence before the Court that any other employee or prospective employee of the Defendant was at any [sic] a member of the Plaintiff's union.

At the conclusion of the strike on July 14, 1972 the Defendant and union signed an agreement regarding the method by which striking employees would return to their jobs. After this agreement, there is no evidence of any further bargaining between the Defendant and the union and no evidence of any contract between the union and any of the Defendant's employees. In mid-1974 the union formally withdrew any claim to being the collective bargaining representative of the Defendant's employees, ostensibly because of a lack of employee support. The union

does, however, vigorously pursue this particular lawsuit. As heretofore noted, the Defendant in its counterclaim contends that the present cause of action was filed solely to promote the union at the expense of the company and its employees.

VI.

The evidence before the Court presents the picture of a company attempting to establish itself as an "affirmative action" employer since the inception of this plant. Specifically, before the plant opened, the company made a determination to hire and maintain a workforce with at least 30% black employees, the percentage of available blacks in the work force in the surrounding counties. In this regard, the Defendant workforce has always been over 30% black, and usually 40% to 50% black. (Tr. 891-892, Esb. [sic] P-1) Further, the Defendant instructed the Mississippi State Employment Service to refer all applicants to it on a non-discriminatory basis. All advertisements for employees, the employee handbook, and the policy manual state unequivocally that Defendant is an equal opportunity employer. [Exb. D-22, D-5(a), (b), (c) and (d). Tr. 900-901]. Defendant has also posted equal opportunity notices on all bulletin boards. Further, Defendant has been very active in its support of "cluster programs" at two predominantly black universities, and has advised all potential sources of job applicants of its program as an equal opportunity employer. See *E.E.O.C. v. Georgia-Pacific Corporation*, 450 F.Supp. 1227 (N.D.Miss.1977).

VII.

In order to fully examine the issues in this case it is necessary to set forth in some detail the organization of this particular plant. (Exb. D-4, D-20, Tr. 913-942). The various departments can be broken down as follows:

MANAGEMENT:

Plant manager, plant superintendent, log yard foreman, sawmill foreman, rough lumber manufacturing foreman, planer mill foreman and shipping foreman. When the plant is operating at one shift, there is only one person in each of these positions and at times there has been no one in the shipping foreman slot. At the time of trial, the plant superintendent position had been vacant for six months.

ADMINISTRATIVE AND OTHER NON-PRODUCTION EMPLOYEES:

Office Manager, accounts payable clerk, secretary-receptionist, janitor and guard. Normally only one person occupies each of these positions with the exception of usually three or four guards at all times.

LOG YARD DEPARTMENT:

Diesel mechanic (skilled position), crane operator (skilled position), front end loader (80,000 pounds) and front-end loader and utility. There is only one employee in the diesel mechanic and front end loader (80,000 pounds) category. The crane operator has never had two employees. The front-end loader and utility positions normally have two employees.

SAWMILL DEPARTMENT:

Chip-n-saw operator (skilled position), trim saw operator, debarker operator, cutoff saw operator, saw filer (skilled position), saw filer helper, millwright (skilled position), millwright helper lead electrician (skilled position), electrician (skilled position) electrican helper and utility. The chip-n-saw operator, saw filer, saw filer helper, lead electrician, electrician, and electrician helper positions

normally carry only two employees per position. At the time of trial there had been no one in the electrician helper position since June of 1973. All of the other positions in this department normally carry two employees in a one-shift operation with the exception of millwright, which usually has six to ten employees. Although millwright helper has had up to four employees, there had been only one employee in this position since January of 1976 at the time of trial.

ROUGH LUMBER MANUFACTURING DEPARTMENT:

Stacker operator, lift truck operator, transfer car operator, kiln operator (skilled position), kiln operator trainee and utility. With the exception of utility which varies from three to four employees according to need, and kiln operator which had been vacant at the time of trial since October of 1973, the plant normally has one to two employees in each of these positions.

PLANER MILL DEPARTMENT:

Machine operator (skilled position), head grader (skilled position), grader (skilled position), trim saw operator, machine helper, lift truck operator, tally clerk, machine feeder and utility. There is normally one machine operator, head grader, trim saw operator, lift truck operator, and tally clerk. There had been no machine helper since July of 1975.

SHIPPING DEPARTMENT:

Shipping clerk, lift truck operator and utility. These positions are filled by one to two people at all times with the clerk and operator position ordinarily filled by one person.

VIII.

All of the above noted departments have been from 30% to 50% black since the date the plant began production. As noted above, there are 11 positions which are considered skilled positions at the plant. The position of shipping clerk is considered an administrative position. There are 32 positions held by hourly employees in the production force alone. With the exception of utility and millwright, these positions are normally filled by one or two employees in a one-shift operation. The millwright position ordinarily has four employees when there is one shift, and two or three more if an additional shift is in operation. The utility position is ordinarily composed of 20 to 25 employees in a one-shift operation.

IX.

The Plaintiff, Robert Boykin, was hired by the Defendant on July 6, 1971 as a utility employee. Boykin's prior experience was working in a factory making wood cabinets, in a post office, and as a leadman in another factory. He also testified to experience in operating a fork lift and other equipment. The only inquiry Boykin made at the time of application was concerning forklift operation and he was informed there was no opening at the time. Boykin testified he had asked his supervisor for a promotion to another utility position or forklift operator. However, he presented no evidence as to the date of these requests, the openings in these positions, or the individual hired to fill a particular opening while he was employed. In fact, the evidence reveals that the forklift operator positions had been filled predominantly by black employees. (Exb. D-19)

The evidence does reflect that Boykin voluntarily terminated his employment in February of 1972 but was re-

hired one month later. Although the testimony is somewhat conflicting this first termination seemingly resulted from a desire to close a house transaction and visit his mother in Chicago. This particular terminations [sic] was not a part of any charge filed with the E.E.O.C. and clearly was not based on race.

Robert Boykin was the elected president of the union local at Defendant's sawmill in 1972 and joined the July 7th strike. The evidence revealed that during the strike Boykin was involved in a picket line incident with another individual named Harold G. Tolar, and was subsequently tried and convicted of a misdemeanor, assault with a deadly weapon. Nevertheless, Boykin was reinstated in accordance with the agreement between the Union and Defendant but subsequently voluntarily terminated his employment on August 22, 1972. Although Boykin alleges he was forced to resign due to the company's desire to "get rid" of him because of his race and involvement with the union, he presented no credible evidence to substantiate this charge. In fact, the record reflects that following the incident with Tolar, he was allowed by the plant manager to return to work with a clean slate regarding the incident. This Court finds absolutely no evidence of a constructive termination in the case of Robert Boykin.

This Court is of the opinion that the Plaintiff Boykin has failed to meet his burden of proof in this case. The record reflects that there were no vacancies in the forklift position when he was hired. Further, the only evidence of record reveals that of the three employees hired as forklift operators while Boykin was employed, two were black. (Exb. D-19, p. 22) These statistics hardly establish a case of racial discrimination. Further, the one white hired was in a different department than Boykin. (Exb. P-3) It is the finding of this Court that the Plaintiff

has failed to demonstrate a prima facie case of discrimination in initial assignment or promotion. This Court further finds that the Plaintiff has failed to establish the Defendant conspired in any way to force his termination in August of 1972, creating a constructive termination situation. The individual claims of the Plaintiff Boykin are totally without merit and should be dismissed.

X.

The Plaintiff T. J. Gholar was hired by the Defendant on August 6, 1970 and worked until February 1, 1972. Plaintiffs do not contend that the termination of his employment was discriminatory on the basis of race and the Court directed a verdict for the Defendant on this issue at the close of the Plaintiff's case. (Tr. 759) Gholar was always classified as a utility employee with prior work experience as a painter, hauling pulpwood, and assisting a brick layer. His testimony indicated he had no skills which would qualify him to be initially assigned or promoted to any other classification. Further, he never asked to be promoted or transferred and was satisfied with his job. (Tr. 654-663) This Court concludes that the Defendant did not discriminate against the Plaintiff T. J. Gholar in any manner because of his race and all claims as to Plaintiff Gholar should be dismissed.

XI.

The Plaintiff Thomas Powell was hired by the Defendant on August 21, 1970 and worked until July 26, 1972. He was classified as a utility employee during this time frame. Powell's prior experience had been as an unskilled employee for 15 years at New Orleans Furniture Company. His testimony does not indicate that he possessed qualifications or skills for a higher job classification nor did he testify he ever sought another position.

Powell testified that when he returned to work after the strike he was required to do the job of two or three men on his first day back on the job and was told by Foreman Joe Murphy that he would do it or else. Murphy denied the allegations and testified that Powell did not say anything to him on the day he was terminated, but advised him that he was going back to his former job. Further, testimony reveals that the number of individuals required to work the so-called "green chain" has varied from 1 to 3 individuals. (Tr. 869-870, 1300-1303) This Court, having heard all the testimony does not find that the testimony of Powell to be credible regarding his contention that he was overworked. Furthermore, the Plaintiff has totally failed to prove that any possible overworking of Powell was because of his race. There is no claim made in this lawsuit that black employees were discharged, constructively or otherwise, either in greater numbers than white employees or were treated differently on individual cases of discharge than white employees. This Court finds that the Plaintiff has failed to prove even a prima facie case of discrimination against the Defendant and his individual claim should be dismissed.

XII.

The testimony reveals that the hiring practices of the Defendant after the initial staffing in 1970 consists of taking a written application from all persons who desire to apply. Each applicant is interviewed regardless of the lack of job vacancies. This interview consists of talking with the applicant to ascertain his prior work experience, skills, interests and desires of employment. Defendant employs no test nor is there a minimum education requirement, although some jobs do require the ability to read and write. An applicant is advised at the time of application that he must update his application within thirty days if

he is not hired during this period. The applicant is called for a second interview at the time a vacancy occurs, if none exists upon application, and is generally interviewed by a different supervisor on the second interview. A decision is then made as to which applicant will fill a particular vacancy. Clearly, this procedure does involve the subjective consideration of various supervisors. As heretofore noted, however, the hiring policy of the Defendant has resulted in a hiring of 41.5% blacks in an area where the work force is 30.25% black. Further, the Plaintiffs were not able to point to a single specific instance where a black applicant was the victim of racial discrimination as the result of the Defendant's hiring policy. The only testimony in this regard was that of John Pittman who applied for the job of a welder or millwright in 1971. No one was hired into the millwright position between February 1971 and February 1973. (Exb. D-20) The proof is clear that blacks have not been denied employment at the Defendant company as the result of its hiring procedure.

XIII.

A new employee at the Defendant plant is normally assigned to the utility classification unless he initially possesses some skill the Defendant has a need for at the particular time and there is no one already employed who is qualified for promotion or reassignment to that position. The testimony reveals the Defendant, after initial staffing of the plant, sought to train present employees for openings rather than go outside the plant. (Tr. 907-909, 911-913, 1024). The testimony reveals that the decision to hire individuals into positions above utility during the first three years of plant operation was made by plant manager Thornton after an in-depth interview regarding a specific job or after an applicant had demonstrated proficiency in that job.

The Plaintiff's proof did not reveal any white applicant who had been hired into a job above utility in favor of a black applicant or employee with greater or equal qualifications for that particular position. Although Exhibit 6-A of the Plaintiffs reveals a disparity between the number of white employees assigned above utility positions as compared to black employees so assigned, it is of limited value in considering this issue. The exhibit ignores the initial staffing of the plant, the administrative/supervisory and clerical positions, the rehiring of former employees, and does not deal with the issue of qualifications or vacancies for the jobs in question. It necessarily assumes that all initial assignments above utility were made without regard to qualifications. Under these circumstances, this Court can afford little weight to this particular exhibit.

Accordingly, this Court is of the opinion that the Plaintiffs have failed to prove that the Defendant engaged in racial discrimination in the making of initial job assignments. The evidence clearly reveals that since the initial staffing of the plant, relatively few positions above the utility classification have been filled from outside the Defendant's work force. When this has been done, the person filling the job had prior related experience and no qualified person within the plant desired or was qualified for the job.

XIV.

As noted hereinabove, the Defendant maintains a policy of filling vacancies above the utility classification from within its own work force whenever possible. Further, the utility position comprises the bulk of the available positions in this now relatively small lumber operation. Vacancies in the non-utility positions have been infrequent, thus rendering numerically small statistical analyses extremely suspect.

In March of 1976 the Defendants began utilization of a "bid system" for the filling of vacancies above the utility classification. This procedure requires all employees to file or fill out a bid form in order to be considered for a promotion. All vacancies are posted plant wide in order that employees may make known their interest in any vacancy. (Exb. D-5) This system affords all employees in the plant written notification of job openings and an opportunity to seek and qualify for any vacancy.

Prior to March of 1976, the Defendant maintained in its handbook a policy for promotion known as "departmental seniority" in the filling of vacancies above the utility classification. Nevertheless, testimony reveals that the Defendant has in fact followed a policy of "plant seniority" since the opening of the plant. (Tr. 1034-1040) Although no formal bid system existed prior to 1976, employees were informed at the time of hiring that they would have to make known their desire for promotion or for training for a position other than the one held, by contacting a member of the supervisory staff. Employees could train on jobs prior to openings, although they could receive promotion without training, depending upon seniority and qualifications. Most vacancies went to employees who had previously trained for that position. An employee would have to transfer to another department to train on jobs in that department, but he would retain his seniority for purposes of promotion. Training was freely given to any employee who sought the same. Although job vacancies were not posted by Defendant prior to 1976, the evidence reveals employees throughout the yard were apprised of vacancies occurring in various departments by supervisors or other employees. In this regard, the Court notes that all departments of the Defendant plant have been from 30% to 50% black since the plant began pro-

duction. In fact, there is no charge of racially segregated departments, and testimony of witnesses indicates free communication between employees and supervisors throughout the Defendant facility. Although the present formalized posting of openings is certainly the preferable procedure, this Court does not find that the prior method utilized resulted in unequal notification of blacks regarding vacancies in the positions above utility at the plant during the time in question.

No evidence was presented that any black employee was denied training opportunities which were given to a white employee. This Court will hereinafter examine in detail specific positions within various departments which the Plaintiffs contend have been underrepresented by blacks. Exhibit D-19 offered by the Defendant reveals that both white and black employees move above the utility position in large numbers. Exhibit D-20 reveals the skills of employees in job vacancy positions in jobs with less than a representative number of blacks. This fully rebuts the exhibits offered by the Plaintiff, Exhibits P-8A, 9-A, 12A and 13A, which do not take into consideration the skills, qualifications work performance, prior experience, job vacancies or the express desires of individuals.

Accordingly, it is the finding of this Court that the Plaintiff has failed to establish allegations of discrimination and promotions by a preponderance of the evidence. Even assuming establishment of a prima facie facie [sic] in this regard, the Defendant has presented legitimate nondiscriminatory reasons for the promotions of specific individuals which have not been shown by the Plaintiff to be a pretext for racial discrimination.

XV.

Turning now to a full examination of the evidence presented relative to the specific job classifications within the various departments, the Court notes that the following jobs have always had a representative number of blacks occupying the position: Utility, lift truck operator, machine feeder, tally clerk, trim saw operator, transfer car operator, cutoff saw operator, debarker, front end loader, front end loader [sic] (80,000 pounds), guard and janitor. This is revealed by examination of Exhibit D-19 which consists of a listing of all employees in each job classification for the 16 printouts which constitute Exhibit P-1. (Tr. 793-797) Exhibit D-19 reveals that there has been a substantial and representative number of blacks in all classifications except those listed on Exhibit D-20. Exhibit D-20 lists every employee who has ever held any of the job classifications listed thereon from the beginning of the plant operation through March 1, 1976. It also shows the employee's race, date of hire, date entered a position, date left a position, date of termination, wage, rates, work history at the plant, and prior work experience. The job classifications for D-20 were presented by the Defendant as those job classifications which did not appear on D-19 as having a substantial or representative number of blacks. These specific positions are examined in detail hereinbelow.

XVI.

SUPERINTENDENT AND PLANT MANAGER - The Defendant has had two superintendents and three plant managers since its inception, all of whom have been white. However, the position of superintendent has been vacant since December, 1974. There is no evidence that there has been a black applicant for any of these positions who

is equally or better qualified than the person hired at the time they were filled.

XVII.

FOREMAN - The Defendant has employed 11 foremen since 1970. There have been two other individuals whose personnel files contain a form denoting foreman but the evidence reveals that neither of them were ever foremen for the Defendant. The testimony further reveals that Leroy Bridges, who is black, declined an offer of the shipping foreman position in 1972. (Tr. 1184) There are presently 5 foremen working for the Defendant company, one of whom, Herron, is black. Murphy was the first employee hired by the Defendant and has been foreman since production began. Tamm had been a planner foreman at Urania Lumber Company and has been the only planner foreman the Defendant plant has hired. Charles R. Tolar has been a kiln foreman since February, 1973, and Fortenberry has been the only shipping foreman Defendant has ever had. No foreman has been hired at the Defendant plant since July, 1973. The evidence reveals that all of the Defendant's foremen have had supervisory and/or skilled experience that would qualify them for this position with the exception of Breedlove. Breedlove was hired as night foreman and terminated after one month when the night shift was ended.

Thus, almost all of the initial supervisory staff of this highly automated and mechanized chip-n-saw mill was brought in from operations outside the State of Mississippi or were hired from the construction company that built the mill. There is no evidence of any black individual being rejected for one of the limited foreman positions which have become vacant over the years or that the position was filled by a lesser or equally qualified white.

This is one category in which the limited number of individuals filling the position over the years render a statistical analysis of little assistance to the Court in determining the true situation. This has thus necessitated the rather complete examination of the employees hired in this particular position.

XVIII.

OFFICE CLERICAL AND OFFICE MANAGER - Defendant has employed ten full-time employees and one part-time clerical employee since its inception, to fill three positions, sales secretary, accounts payable clerk, and secretary-receptionist. Each of these employees had prior relevant work experience in clerical duties when she was hired. Two of the individuals, Tamm and Butler, have been employed since the plant's opening and are the only employees who have held the position of sales secretary and accounts payable. No proof was presented that any black applicant for these positions had equal or better qualifications at the time of hiring. Of the remaining eight full-time clericals, secretary-receptionist, two have been black, Frelix and Fortenberry. There is no proof that any black applicant had qualifications equal to or greater than the remaining six white employees that have been hired. In fact, there is no proof that any black individual ever sought an office clerical position other than the two that were hired.

Defendant has employed three office managers since its opening, all of whom have been white. There is no proof that any black applicant or employee had qualifications equal to or greater than any of these individuals hired. Nor is there any evidence that any black individual ever sought this position at any time.

XIX.

SAW FILER AND SAW FILER HELPER - The Defendant has employed four saw filers and six saw filer helpers since the plant's inception, all of whom are white. All of these individuals were clearly qualified for these positions. A saw filer's position is the most skilled position at the plant and is the highest paying hourly position. (Tr. 907-908) There is no evidence of any black individual being rejected for this position in favor of a lesser or equally qualified white. The Plaintiff did present one witness, Larry Brent, who claimed to have requested the position of saw filer helper, which was ultimately filled by a white, Charles Stogner. However, the facts reveal that not only was Brent an unreliable and unskilled employee, but that Stoger [sic] was a qualified saw filer at the time he was hired. The evidence reveals that Brent had quit Defendant's employ four or five times, including walking off during a work shift. Further, two black employees had rejected an offer of filling this particular position. The evidence reveals that this selection of Stogner was not racially motivated. The evidence further fails to reveal any black individual who sought the position of saw filer helper or the employment of any white with lesser or equal qualifications than a white employee or applicant.

XX.

ELECTRICIAN, LEAD ELECTRICIAN, AND ELECTRICIAN HELPER - The Defendant has employed four electricians and one lead electrician since the plant's inception, all of whom are white. The one white lead electrician was hired at the time the plant began operation in 1970. There is no evidence of any black individual being rejected for the position of electrician or lead electrician

in favor of a lesser or equally qualified white, nor is there any evidence that any black ever sought either of these positions. The facts do reveal that the electrician positions require a high degree of experience and competency.

Defendant has employed four white electrician helpers at his plant, but this position has not been occupied since June of 1973. There is no evidence of any black individual being rejected for this position in favor of a lesser or equally qualified white, nor any evidence that a black has ever sought this position.

XXI.

MILLWRIGHT/CARPENTERS - Defendant has employed two millwright/carpenters, both of whom are white. This position was only in existence for a short period of time as these individuals were employed to construct additional buildings at Defendant plant, with the understanding that they would be terminated when the job was completed. They were hired solely because they could not secure adequate insurance coverage to build these additions on a contract basis. There is no evidence of any black individuals being rejected for this position in favor of a lesser or equally qualified white.

XXII.

MILLWRIGHT HELPER AND MILLWRIGHT - Defendant has employed 21 millwright helpers since its opening, one of whom was black. Another black individual was classified as an oiler, the position title which preceded millwright helper. There was no one in this position in August of 1972 until January of 1976 and there has been only one in the positions [sic] since January of 1976. Only 8 out of these 20 were hired at the time the plant was

being staffed. Seven of these individuals had prior related experience and the eighth, who was later promoted to electrician, had experience operating heavy equipment and as a sheet metal worker. Evidence reveals that five individuals did not have related prior experience shown on the application, but testimony indicates experience in the mill before being promoted to this particular position. There is no evidence of any black individual being rejected for the position in favor of a lesser or equally qualified white.

In this regard, L. J. Daniels testified at trial that he requested promotion to millwright helper position several times when he knew there were vacancies. The facts reveal that five millwright helper positions opened while Daniels was employed with the Defendant. One of these positions was filled by Herron, who is black. The other four positions were filled by white individuals who either had more seniority and/or prior related experience. Daniels' prior experience was that of operating a hand sander at a furniture plant. Further, Daniels testified he had no skills or experience in the millwright trade. Kermit Holloway, a black individual, testified at trial that he requested a transfer to the millwright helper position but the position was given to a white, Charles M. Tolar. The facts indicate that Tolar had maintenance skills whereas Holloway's testimony reveals he had no prior maintenance experience and skills equal to that of Tolar. The third individual, W. B. Daniel, testified that he applied for a millwright helper position but was told there was no opening and was thus forced to accept a utility position. He further testified that a white, Vernon Williamson, was promoted to millwright helper instead of him during this time frame. The facts indicate that Daniel had no skills in the area of the millwright position.

The Defendant has employed 21 persons as millwrights, one of whom was black. There are presently only four millwrights employed. Two of the 21 millwrights held other positions while they were so classified. Ten millwrights had worked previously as millwright helpers. Only three individuals, Brewer, Sims and Smith, showed no related qualifications on their applications and had not served as a helper prior to acquiring a position. The Court finds that Sims' qualifications were misrepresented at the time of hire. (Tr. 960). Brewer had worked previously as a saw filer and was classified in both the millwright and saw filer categories when he was rehired. This Court finds that the Plaintiff has failed to show by a preponderance of the evidence that any black individual was rejected for the position of millwright in favor of a lesser or equally qualified white.

XXIII.

KILN OPERATOR AND KILN OPERATOR TRAINEE - Defendant has employed four kiln operators, all of whom have been white. Two of these individuals were also classified as millwright/kiln operators. There is no evidence that any black individual was rejected for this position in favor of a lesser or equally qualified white or that any black ever sought this position.

Defendant has employed four kiln operator trainees, but no one has been employed in this position since October of 1973. There is no evidence that any black individual has been rejected for this position in favor of a lesser or equally qualified white, nor any evidence that any black individual has ever sought this particular position.

XXIV.

CRANE OPERATOR - Defendant has employed four crane operators since its inception, one of whom was black. This position requires the operation of a "knuckle boom", a hydraulic machine used for stacking of logs. (Tr. 1156-1157) One black individual, Tate, testified that he worked from August of 1970 to October of 1973 as a utility man and felt he was qualified for the position of crane operator. The evidence reveals, however, that he had never operated a crane, although he had worked as a "hook-on man" on an "overhead" crane at Ingalls Shipyard. Defendant did not utilize overhead cranes. The crane operator job was filled when Tate was hired and there was no vacancy until five or six months after he left the employment of the Defendant. There is no evidence that any other black employee or applicant was qualified and/or sought the crane operator position anytime when it was filled by one of the few employees to occupy this position.

XXV.

CHIP-N-SAW OPERATOR - Defendant has employed ten chip-n-saw operators since the opening of the plant and another employee who was classified as a chip-n-saw operator/millwright. The chip-n-saw is a complex machine through which the logs are turned into lumber at the rate of 208 feet per minute. The operator is responsible for the production of the Defendant's plant and he is required to get maximum yield from each log that comes through the operation. The job requires consistency and knowledge of the production process as well as superb motor skills to perform the operation of this machine. All ten individuals who have served in this position have been white. Two black individuals were

trained for this position and one of these took a millwright position before completing his training. Several white employees have also trained for the operation without being promoted to the position.

Three of the ten operators were hired into the position at the time of the plant's beginning. Hudson was hired into the position in 1970 and Carroll, who had originally been assigned to operate the debarker, was promoted to the position in November of 1970. Tommy Turnage was hired into the position in December of 1970. Hudson left when T. Turnage was hired. These are the only individuals initially assigned as chip-n-saw operators except for the rehiring of Tommy Turnage (twice), Gerald Turnage (twice), Louis Broome (once), and Billy J. Broome (once). Billy J. Broome was promoted to the position after three months on the cutoff saw. Louis Broome was employed for eight months as a debarker operator and was rehired during the strike. He worked for four months before being promoted to chip-n-saw operator. Toxie Polk was employed for 14 months before being promoted to operator.

Since the plant reopened in June 1975, Defendant has employed only one chip-n-saw operator at a time. They have been Thomas Turnage and Billy J. Broome. In fact, no one has been promoted to this position since May of 1973 except for the rehiring or reassignment of former chip-n-saw operators.

In conclusion, there have only been 10 operators in all, and only 6 operators after the plant was originally staffed. Although the Court heard testimony of several black individuals claiming they had sought this position, there is no credible evidence to show that a qualified black was denied a position or training for the position in favor of a lesser or equally qualified white.

XXVI.

SHIPPING CLERK - The Defendant has employed five shipping clerks since its inception, all of whom have been white. Defendant utilized a shipping clerk to prepare, maintain and record its shipping invoices, and other paper work associated with the plant operation. There is no evidence of any black individual being rejected for this position in favor of a lesser or equally qualified white. In this regard, Leroy Bridges, a black employee, has been in this department since the plant began operation, but is unable to read and write. His salary has always been above the lift truck operator scale. In each instance where a vacancy has been filled, the advice and counsel of Bridges as to the individual to be given this position has been sought and followed. (Tr. 1182-1185)

XXVII.

MACHINE OPERATOR & MACHINE HELPER - Defendant has employed five machine operators, all of whom have been white. One black individual, White, testified that he requested this position when a vacancy occurred but the position was given to a white employee named Willey. White's testimony was confusing as to whether the machine operator and trim-saw operator were the same positions or not. Assuming his testimony dealt with the machine operator position, the evidence clearly revealed the positioned [sic] was filled by an employee with substantially superior qualifications to White. White had no previous experience in mechanical work and did not testify to any skilled training in this area.

There have been eight or nine machine operator helpers at the Defendant plant, one of whom was black. This black individual was the last person in the position

and it has been vacant since July 3, 1975. Another black employee quit just prior to the time he was due promotion to this position. (Tr. 969) There is no evidence of any black individual being rejected for this position in favor of a lesser or equally qualified white.

XXVIII.

STACKER OPERATOR - The Defendant has employed six stacker operators, two of whom were black. One of the white individuals hired in this position was a relief stacker through March of 1976. Another black employee, Green, has been offered this position but refused the same on two different occasions. (Tr. 1227) There is no evidence that any black individual has been rejected for this position in favor of a lesser or equally qualified white.

XXIX.

GRADER AND HEAD GRADER - Defendant has employed eight graders, two of whom have been black. Two other black employees have been offered this position. Two of the white graders have also been classified as head graders. A black grader, Newsome, testified that a white employee, Graham, had been selected over him for the position of head grader, although he had more seniority than Graham. The testimony of the plant manager, Thronton, revealed that Newsome was not selected for this position because he lacked the qualifications to make reports and handle the necessary reading, writing and mathematical requirements of the head grader position. In this respect, Newsome did not refute this testimony. (Tr. 881-883; 448-451) There is no evidence before the Court that any black individual was rejected for the position of grader or head grader in favor of a lessor [sic] or equally qualified white.

XXX.

DIESEL MECHANICS - Defendant employed seven diesel mechanics and one mechanic helper, all of whom have been white. The mechanic helper was employed for only two days and is the only one to ever have been hired into this position. Herron testified that he knew of only one black in the community with the requisite skills to be a diesel mechanic. This individual was hired in a lower classification, pursuant to Herron's recommendation, on the basis he would become a mechanic if an opening occurred. The individual quit, however, prior to any opening. Plaintiff Boykin testified to having had four weeks of training as a diesel mechanic at a trade school, but the position was not vacant while he was employed. This Court finds there is no credible evidence that any black employee or applicant was qualified and and/or sought the diesel mechanic position at any time it was awarded to a lesser or equally qualified white.

XXXI.

The statistical exhibits presented by the Plaintiff do not reveal a significant statistical conclusion as to whether there was discrimination against blacks in employment. Some of the exhibits utilized the determination of counsel for the Plaintiffs as to which employee did or did not have the "relevant prior experience." These exhibits reflecting counsel's subjective determination of relevant prior experience are not supported by the evidence.

Plaintiffs further use the concept of averaging on a number of their exhibits. This concept is not proper in a case in which the average has relatively small numbers and lump together skilled, semi-skilled and unskilled jobs into the same categories. The Plaintiff's statistical ex-

hibits ignore the fact that there are over thirty-five different jobs in the plant which require different skills and pay different wages.

The Plaintiffs' expert, Gordon Henderson, is a political science teacher who testified as to the statistical significance of various exhibits. He assumed, however, that all factors related to the employment decision, i.e., skills, prior experience, dates of application, dates of job openings were equal or "held constant." On the other hand, the Defendant's expert, a mathematician and statistician, was of the same opinion if the employment decisions were based on "chance alone." This Court finds that the testimony of these experts coincides in this particular instance, and that the description used by the Defendant's expert is the better phraseology. Nevertheless, this Court does not find that all employment decisions are made by "chance" or that all factors entering into employment decision would be "held constant". This type of analysis may well be valid for voting registration or reapportionment cases where the only variables are age and residency which can easily be ascertained. It does not lend itself to a reasoned analysis of employment decisions which are necessarily based on factors such as skill, experience, dates of openings, and motivation of the individuals seeking employment.

Statistical analyses by the experts testifying in this case involving a relatively small labor force with infrequent openings in certain positions is of very little assistance to the Court in ascertaining an accurate picture of the hiring practices of the Defendant. As heretofore noted, this entailed the rather lengthy detailed examination of the actual hiring practice in each specific position which the Court considered under-represented by blacks over the six years in question of this plant's operation.

The Defendant's D-19 and D-20, and the Court's examination thereof, effectively rebut any inference which the statistical exhibits of the Plaintiff may have established. Defendant's evidence in this regard reveals that the Defendant utilized proper non-discriminatory criteria in selecting individuals for employment, initial assignment, and promotion. The matching of job openings to the person receiving those jobs, along with the other evidence presented, clearly reveals that race was not a factor in Defendant's selection of employees for employment, initial assignment, or promotion.

XXXII.

The Defendant owns and operates a number of other manufacturing facilities in the State of Mississippi. On November 7, 1974, the E.E.O.C. filed a similar complaint in the United States District Court for the Northern District of Mississippi, alleging that the Defendant had engaged in racial discrimination at each of its operations in this State with the exception of the plant involved in this case. The District Court found that the Defendant had not discriminated on the basis of race in each of the three areas attacked by the E.E.O.C. therein; hiring, initial assignments and promotion. *E.E.O.C. v. Georgia-Pacific Corporation*, 450 F.Supp. 1227, 1242 (N.D.Miss. 1977).

XXXIII.

In light of the foregoing analysis, this Court finds that the Plaintiffs have failed to show by a preponderance of the evidence that the Defendant has committed any acts of illegal employment discrimination with respect to members of the black race.

CONCLUSIONS OF LAW

I.

Since August of 1970, the Defendant has continuously been and is now an employer engaged in industry affecting commerce within the meaning of Section 701(b) (g) and (h) of Title VII, 42 U.S.C. Section 2000e(b), (g) and (h).

II.

The Defendant acknowledges jurisdiction of this Court pursuant to Section I of the Civil Rights Act of 1866, 42 U.S.C. Section 1981. However, Defendant asserts that this Court does not have jurisdiction pursuant to 42 U.S.C. Section 2000e *et seq* because the individual Plaintiffs did not file a charge of discrimination with the E.E.O.C. or receive a "right to sue" letter as required by 42 U.S.C. Section 2000e-5(f)(1). The Defendant also contends the Plaintiff union did not properly file the charge on which it asserts Title VII jurisdiction because it did not provide the E.E.O.C. with the names and addresses of persons on whose behalf the charge was made as required by 29 C.F.R. Section 1601.7.[2] The Defendant contends this resulted in the E.E.O.C. not grieving the charge filed by the Plaintiff union.

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2. 29 C.F.R. Section 1601.7 reads as follows:

(a) A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name, address and telephone of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization

(Continued on following page)

Case law establishes that a certified collective bargaining representative has standing to challenge employment practices that allegedly discriminate against the employees in the bargaining unit on grounds of race or sex. A union which is clearly maintaining an action as a part of its representational capacity under a collective bargaining agreement may be a proper plaintiff for the purposes of seeking injunctive relief in a Title VII proceeding. *I.W.A. v. Georgia-Pacific Corporation*, 568 F.2d 64 (8th Cir. 1977); *Local 194, R.W.D.S.U. v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976); and *Warth v. Seldin*, 422 U.S. 490 (1975). The union must allege that its members are suffering ". . . injury as a result of the challenged action of the sort that would make out a justiciable [sic] case had the members themselves brought the suit." *Warth*, supra, at 511. However, this situation does not exist in the case sub judice. The Plaintiff union herein seemingly withdrew any semblance of representation of its purported employee membership after the abortive strike attempt at the Defendant plant in July of 1972. Although a general charge with the E.E.O.C. was filed by the union during this time frame, this suit was not filed until August of 1973. As heretofore noted, there is no evidence of any contact between the Plaintiff's union and any of the Defendant's employees after July of 1972 until the official withdrawal of any claim as collective bargaining representative in mid-1974. Sec-

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Footnote continued—

of such charge by the person on whose behalf the charge is made. Any such person may request that the Commission shall keep his or her identity conficential [sic]. However, such request for confidentiality shall not prevent the Commission from disclosing the identity to Federal, State or local agencies that have agreed to keep such information confidential. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests for such information.

ondly, although there is evidence that individual Plaintiffs Boykin and Powell were at one time members of the Plaintiff union, there is no evidence that any individual plaintiff or any of the Defendant's employees were members of this union when suit was instituted. In this regard there is no evidence that any of the Defendant's employees other than the the two named Plaintiffs were ever members of the union.

29 C.F.R. Section 1601.6 requires anyone who files a charge for another to provide the Commission with the name and address of the person on whose behalf the charge is made. Plaintiff's union did not do so in this case. Further, the E.E.O.C. is required to verify the authorization of such charge by the person on whose behalf the charge is made. Three individual Plaintiffs had no contact with the E.E.O.C., and there is no evidence that the Plaintiff union attempted to have anyone verify the authorization.

This charge was filed by the counsel for the union, Mr. James Youngdahl, during the pendency of a strike at the Defendant plant involving primarily black employees. This charge was not filed by a layman unfamiliar with the regulations of the E.E.O.C. and the omitted information which would have allowed this charge to be properly grieved by the E.E.O.C. was the sole responsibility of the Charging Party union. This case is not analogous to the situation in *Dent v. St. Louis-San Francisco Railway Company*, 406 F.2d 399 (5th Cir. 1969). Although the Defendant has not convinced this Court of the merits of its counterclaim concerning the union's prosecution of this action, the facts certainly hint of a union utilizing all available methods to attack a company during a strike and continuing the attack long after it had lost support among most, if not all, of its members. The proper filing

and follow through with the charge lodged with the E.E.O.C. in 1972, may well have resulted in the resolution of this case through conciliation. This Court cannot say the Defendant company has not been prejudiced by this failure of the union to follow statutory prerequisites.

Under these circumstances, this Court is of the opinion that the Plaintiffs have not properly fulfilled the jurisdictional prerequisites to maintaining this suit pursuant to Title VII of the Civil Rights Act. As heretofore noted, the individual Plaintiffs have taken no action whatsoever toward fulfilling the prerequisites of filing a charge with the E.E.O.C. and securing a "right to sue" letter. Nevertheless, because the case law is conflicting at best in this particular area, this Court deems it appropriate to decide this case assuming that all jurisdictional prerequisites under Title VII have been met by the Plaintiff union. As heretofore noted, jurisdiction is admitted pursuant to 42 U.S.C. Section 1981.

III.

The discussion hereinabove, however, leads to a second difficulty in the consideration of this case. This Court is not convinced that the Plaintiffs have shown that this suit is a proper class action within the requirements of Rule 23 of the Federal Rules of Civil Procedure. The Plaintiff has the burden of establishing these prerequisites. Although the Court initially tentatively certified this case as a class action for purposes of completion of discovery and presentation of the evidence, a final ruling on the issue of class representation was reserved until after hearing on the liability. The prerequisites of a class action not present in this case include the lack of a proper representative of the alleged class and the absence of proof of sufficient numerosity to necessitate the filing of a class action.

The Plaintiff contends it has the right to represent a class of black employees and applicants in this action. However, the evidence reveals that the Plaintiff union simply engaged in negotiations for a collective bargaining agreement with the Defendant for about a three-month period in 1972. Thereafter, there was a strike of Defendant's employees for one week during July of 1972, during which time the Plaintiff union filed a charge with E.E.O.C. There was no contact between the Plaintiff union and the Defendant until this suit was commenced in August of 1973. There is no evidence of any contact between the union and Defendant's employees during this time. In mid-1974 the union withdrew its legal status as the collective bargaining representative of Defendant's employees because of a lack of support. These facts are not controverted. Further, none of the individual Plaintiffs have had any contact with the Defendant plant since August of 1972. Even assuming proper representation of a class of employees affected by discriminatory practices in initial hiring or promotion, the Court finds that the three individuals [sic] Plaintiffs could not properly represent a class of applicants. *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395 (1977). In this regard, the interest of a sub-class of applicants represented by the individual Plaintiffs are antagonistic to that of employees seeking higher positions at the Defendant's plant. There is no evidence that any applicant has ever been a member of the Plaintiff union.

Secondly, there is a complete absence of evidence in the record regarding sufficient numerosity to constitute the need for the maintenance of this case as a class action. The evidence does not reveal any employee, other than perhaps Boykin and Powell, who have ever been members of the Plaintiff union. The relatively few

individuals testifying concerning alleged discriminatory action on the part of the Defendant in initial assignment or promotion could easily have maintained an individual action in regards thereto. In fact, there was very little evidence whatsoever adduced at the hearing in this matter relative to the numerosity requirement of Rule 23.

Under these circumstances, this Court is of the opinion that the prerequisites of a class action have not been satisfied under Rule 23, F.R.Civ.P. and this case should not be certified as such. Nevertheless, because the Court has fully considered all matters in this case, this Court will assume a class action for further consideration of the issues herein.

IV.

The Plaintiff must prove by a preponderance of the evidence that the Defendant is engaged in unlawful employment practices in violation of title VII. *Texas Department of Community Affairs v. Burdine,* ..... U.S. ....., 101 S.Ct. 1089, 67 L.Ed. 2d ..... (1981); *Furnco Construction Corporation v. Waters,* 438 U.S. 567 (1978); *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975); *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). The Plaintiffs' burden is to offer "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Teamsters v. United States,* 431 U.S. 324, 358 (1977). Assuming that the Plaintiff is successful in this regard, the Defendant must then articulate some legitimate nondiscriminatory reason for its actions to rebut the Plaintiff's proof. The Plaintiff then has the opportunity to attempt to prove by a preponderance of the evidence the Defendant's articulated reason(s) was a pretext for discrimination. *Texas Department of Community Affairs v.*

Burdine, supra; *Furnco Construction Corp. v. Waters*, supra; *McDonnell Douglas Corporation v. Green*, supra.

Initially, the Plaintiff must simply prove that the individual applied for an available position, for which he was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. After articulation of a reason for the plaintiff's rejection or that someone else was preferred for a legitimate, non-discrimnatory reason, the plaintiff must show that the proffered reason is not the true reason for the employment decision. The plaintiff always retains the burden of persuasion. Plaintiff may succeed by showing "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, supra.

V.

Before any relief may be granted, the Plaintiff must meet its burden of proof. As to individuals, it must show that each was the victim of racial discrimination pursuant to the requirements set forth in *McDonnell Douglas, supra*, as amplified in *Burdine*, supra. As to a class, it must be shown that there was a racially discriminatory pattern of practice which created an identifiable class of blacks who suffered at least some damage. *United States v. United States Steel Corporation*, 520 F.2d 1043 (5th Cir. 1975); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). The Plaintiff has the burden of making a prima facie showing that an employment policy or practice has a disproportionate impact upon persons protected by Title VII before entitled to any modification of the challenged employment practice. *McDonnell Douglas v. Green*, supra; *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In

class action litigation, the plaintiff must prove that the defendant's standard operating procedure constituted discrimination and the proof of "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is not sufficient. *Teamsters v. United States*, 431 U.S. at 336. In an action under 42 U.S.C. Section 1981, the Plaintiff must prove a discriminatory purpose. *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978).

VI.

The Court concludes that Defendant did not discriminate on the basis of race or color in its treatment of the Plaintiff, Robert Boykin, Jr. We find that Boykin was not unlawfully terminated on the basis of race by Defendant on February 21, 1972 or August 22, 1972. The Court further finds that Boykin was not discriminated against as to work assignments, or opportunities for training or promotion because of his race. The Court finds that Boykin has not been discriminated against in any manner because of his race or color and has not been treated in a disparate manner by the Defendant.

VII.

The Court concludes that Defendant did not discriminate on the basis of race or color in its treatment of Plaintiff T. J. Gholar. This Court granted a directed verdict for the Defendant at the close of the Plaintiff's case on the issue of Gholar's termination of employment. The Court finds that T. J. Gholar was not discriminated against as to work assignments or opportunities for training or promotion because of his race or color. The Court finds that Gholar has not been discriminated against in any manner by the Defendant and has not received any disparate treatment because of his race or color.

VIII.

The Court concludes that the Defendant did not discriminate on the basis of race or color in its treatment of Plaintiff Thomas R. Powell. The Court finds that Thomas R. Powell was not unlawfully terminated by the Defendant on or about July 26, 1972, but voluntarily quit. The Court further finds that Powell was not discriminated against as to work assignments, or opportunities for training and promotion because of his race or color.

IX.

The Court finds that the record in this case indicates the percentage of blacks in the Defendant's company exceeds the percentage of blacks in the civil labor pool for the regional area. Although "obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force," the fact remains that no conclusive proof demonstrating discrimination in hiring has been shown in the case sub judice. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978); *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). Although the Court recognizes the statistical disparity of blacks in several departments and positions of the Defendant existing at the time of filing and prosecution of this lawsuit, it should be noted that statistics must be taken in light of the facts in each case. *Teamsters v. United States*, 431 U.S. at 340. Thus, while a prima facie case of discrimination by racial disparity may be established by statistical evidence, the statistics must nevertheless be scrutinized closely, and are not conclusive proof of past or present discriminatory practices. *Teamsters v. U. S.*, supra; *Myers v. Gilman Paper Corp.*, 544 F.2d 837

(5th Cir. 1977); *James v. Stockham Valve and Fittings Company*, 559 F.2d 310 (5th Cir. 1977); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 225 n.34 (5th Cir. 1974). The Court recognizes that statistics often contain many complexities and variables and require close examination. This is particularly true when a small company is involved which has a relatively small work force and the statistical data is often insufficient to support any conclusion as to whether discrimination has occurred. *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 693 (5th Cir. 1979); *Robinson v. City of Dallas*, 514 F.2d 1271, 1273 (5th Cir. 1975); *Ochoa v. Monsanto*, 473 F.2d 318, 319-20 (5th Cir. 1973). As noted hereinabove, certain Plaintiff's exhibits utilized counsel's subjective determination of "relevant prior work experience" and are not valid as they are not supported by competent evidence. Other exhibits do not rise to the level of a type of statistical analysis which has been found to establish a prima facie case of discrimination. Further, the Plaintiffs' expert witness testified that the use of statistics in this case was based upon the assumption that all persons would react equally to employment situations. He assumed that all factors related to employment decisions, i.e., skills, prior experience, dates of application, and dates of job openings were equal or "held constant". Under these circumstances, this Court can place little credence in the statistical analysis presented by the Plaintiff herein. On the other hand, Exhibits D-19 and D-20 present a complete analysis of the vacancies at the employment plant over the six-year period in question. This Court is of the opinion that the in-depth examination of these exhibits, as supplemented by relevant testimony, presents the accurate picture of the employment practices of the Defendant company during time period in question.

This Court has carefully considered the statistical evidence of the Plaintiffs and Defendant and concludes that the Plaintiffs have failed to establish by a preponderance of the evidence that the Defendant has engaged in any unlawful employment practices. The cases in which the courts have held that the statistical evidence created a prima facie case are not applicable herein. In each of these cases in which statistics have "carried the day" for the plaintiff, the numbers have been such as to leave no doubt that a pattern of discrimination existed and were not rebutted by the defendant's evidence. Such numbers do not exist in this case and Defendant has presented ample rebuttal.

X.

As heretofore noted, this Court finds no proper representative of applicants in regard to alleged hiring discrimination. The three individual Plaintiffs were all hired and do not complain of any discrimination in that regard. See *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977). Plaintiff union presented no proof that any of its members had ever applied for work with the Defendant and certainly no proof that any of its members had ever been denied employment for any reason. Further, discrimination in hiring was not a part of the charge filed by the Plaintiff union with the E.E.O.C.

Nevertheless, assuming this is a proper charge before this Court and that the Plaintiffs and/or union are proper representatives of applicants herein, the evidence presented at trial demonstrates that the Plaintiffs are not entitled to prevail in this claim of discriminatory hiring practices. The Defendant's hiring practices have not discriminated against blacks. The statistics presented in this case show that Defendant has hired 41.5% blacks in an area where

the work force is 30.25% black. The relevant available work force is a proper standard to use in determining whether the Defendant has met its standard for hiring. *E.E.O.C. v. Georgia Pacific Corp.*, 450 F.Supp. 1227 (N.D. Miss.1977); *Robinson v. Union Carbide Corporation*, 538 F.2d 652 (5th Cir. 1976).

XI.

This Court is of the opinion that there has been no discrimination in initial assignments at Defendant plant. The Court finds that the Plaintiffs have failed to prove by a preponderance of the evidence that any black employee has [sic] denied an initial job assignment above the utility classification which was given to a white employee with less or equal qualifications or that any group of black employees was denied initial job assignments above the utility classification which were given to white employees with less or equal qualifications. The Court finds the Defendant has not maintained any policy or practice with regards to initial job assignments that has served to create any artificial, arbitrary or unnecessary barriers to initial job assignments of black employees above the utility position. *Griggs*, supra. Further, the record as a whole does not establish by a preponderance of the evidence that Defendant has failed or refused to award black employees as a group initial job assignments above the utility classification because of their race or color. The few instances in which whites have been awarded job assignments above the classification of utility have been shown by the Defendant to be on the basis of prior skills or experience of the individual employee and the proof clearly fails to reveal these few instances of hiring above utility classifications of white employees to be a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, supra.

XII.

Plaintiffs have alleged that during the time period in question there were no blacks in upper level management positions and very few in supervisory or foreman positions. However, not only has there been a negligible turnover in the company's few upper level and supervisory positions, but the Plaintiff has also not shown there were any qualified black applicants or current employees available at the times these individuals received their jobs. In light of the foregoing, the Plaintiff has not proven that any artificial or invidious barriers exist to deny blacks equal opportunity. *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689 (5th Cir. 1979). The same situation exists with the disparities presented in regards to various positions within several departments located throughout the Defendant company's operation. Not only has the Plaintiff failed to show the existence of qualified black applicants or employees available or desirous of training for promotion, but the Plaintiff has also failed to show that the positions were filled by less or equally qualified whites.

XIII.

The Court finds that the Defendant's policy and procedure in determining promotions was equally applied to all employees. Although the procedure prior to the implementation of the new bid system in 1976 may not have been the best procedure, this Court is convinced that it did not discriminate against blacks in promotion opportunities. The evidence fails to indicate that blacks were treated any differently under the system than whites or that the system had disparate effect upon blacks. *Furnco Construction Corp. v. Waters*, supra. Title VII does not require an employer to announce vacancies or to consider all applicants, black and white, for all jobs. *Lewis v. Tobacco Workers*

International Union, 577 F.2d 1135 (4th Cir. 1978); *Furnco Construction Corporation v. Waters*, supra. Blacks desirous of promotion had the same opportunity to train for particular positions in the Defendant company and be chosen for that position when the infrequent vacancies occurred.

This Court concludes that Defendant's policy and procedure in determining promotions is applied equally to blacks and whites alike. The Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that any black employee was denied a promotion which was given to a white employee with less or equal qualifications or that any group of black employees was denied promotions which were given to white employees with lesser or equal qualifications. The Court concludes that the Defendant does not maintain any policy or practice with regard to promotions that serves to create an artificial, arbitrary or unnecessary barrier to the promotion of black employees. Further, the record as a whole does not show that the Defendant has refused to promote black employees as a group because of race or color. *Griggs v. Duke Power Company*, supra; *Burdine*, supra.

Due to the failure on the part of the Plaintiff to demonstrate a case of discrimination through direct testimony and/or the use of proper statistics, the Court is of the opinion the Defendant has performed no illegal act so as to entitle the Plaintiff to relief, either in the form of damages or injunctive relief.

XIV.

Pursuant to 42 U.S.C. Section 2000-5(k), attorneys' fees may be allowed as an item of cost to the prevailing defendant employer in employment discrimination suits. However, the awarding of attorneys' fees is a discretionary decision on the part of the Court. In this respect, attorneys'

fees should be assessed when it is obvious that the Plaintiff's claim was brought as a means of harassment or frivolous reasons. *Christiansburg Garment Corporation v. E.E.O.C.*, 434 U.S. 412 (1978). Although questions may arise as to the motives of the union in this particular lawsuit the Court is of the opinion that this lawsuit is not one of a frivolous nature. Therefore, it is the opinion of this Court that the Defendant is not entitled to attorneys' fees in this case. *E.E.O.C. v. Georgia-Pacific Corporation*, 450 F.Supp. 1227 (N.D. Miss.1977).

XV.

The Court, having concluded the evidence as a whole does not establish by a preponderance of the evidence that the Defendant engaged in any unlawful practice, concludes that no black individual or individuals are entitled to any monetary or other relief from the Defendant. Accordingly, the case against the Defendant, Georgia-Pacific Corp., should be dismissed with all costs assessed to the Plaintiff. The Defendant's counterclaim herein has not been proven by a preponderance of the evidence and the relief sought therein is denied. All costs associated therewith are hereby assessed against the Defendant.

RECOMMENDED this the 27th day of August, 1981.

/s/ John M. Roper
United States Magistrate

APPENDIX "C-1"

(Filed November 30, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. 73H-64(R)

ROBERT BOYKINS, ET AL
PLAINTIFFS

vs.

GEORGIA-PACIFIC CORPORATION
DEFENDANT

ORDER

This matter is before the Court on the Recommendation of the United States Magistrate in the above styled and numbered cause. Objections to the Recommendation have been filed by both plaintiffs and defendant and the Court having considered such objections and the proposed findings of fact and conclusions of law and other briefs submitted by the parties in support of their objections, the Court is of the opinion that the Recommendation is not clearly erroneous or contrary to law.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Recommendation be and is hereby fully adopted by this Court as the Court's final decision in this matter.

SO ORDERED, this the 27th day of November, 1981.

/s/ Dan M. Russell, Jr.
United States District Judge

APPENDIX "D"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

GEORGIA-PACIFIC CORPORATION, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its Plywood Workers Local Union 3181, United Papermakers and Paperworkers, AFL-CIO, its Local Union Number 1076, International Woodworkers of America, AFL-CIO, CLC, and its Local Union 5-349, Defendants.

No. EC-74-134-S.

United States District Court,
N. D. Mississippi, E. D.

Dec. 8, 1977.

Equal Employment Opportunity Commission brought employment discrimination suit against employer. The District Court, Orma R. Smith, J., held that: (1) Commission failed to establish that employer had discriminated against its employees on the basis of race, and (2) employer was not entitled to award of attorney fee, in view of absence of evidence that Commission brought proceeding in bad faith, without reasonable grounds, or to harass or embarrass employer.

Action dismissed.

1. Civil Rights (Key) 44(1)

Evidence established that employer had not discriminated against its black employees. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

2. Civil Rights (Key) 34

Fact that charges with respect to certain plants of employer had not been taken through administrative process by Equal Employment Opportunity Commission did not necessarily preclude Commission from charging employer with racial discrimination in employment at those plants, where charges involving allegations of discrimination at other plants had been acted upon and where employer's operations in various plants were subject to one source of supervision and control. Civil Rights Act of 1964, §§ 701 et seq., 706(k) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-5(k).

3. Civil Rights (Key) 44(1)

In an employment discrimination suit brought by Equal Employment Opportunity Commission, initial burden rests with Commission to prove by preponderance of evidence that employer has intentionally engaged in or is intentionally engaging in unlawful employment practices. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

4. Civil Rights (Key) 43

Where racial discrimination in employment practices is alleged, plaintiff must first establish prima facie case of discrimination before burden of producing evidence shifts to employer. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

5. Civil Rights (Key) 43, 44(1)

Once plaintiff in employment discrimination suit has established prima facie case, burden then shifts to employer to prove legitimate, nondiscriminatory reasons for his actions by preponderance of the evidence, and upon proper

proof of legitimate reason for employer's action, plaintiff then bears burden of proving by preponderance of the evidence that the articulated reasons are a pretext for racial discrimination. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

6. Civil Rights (Key) 44(1)

Statistics are often sufficient within themselves to make prima facie case of employment discrimination based on race. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

7. Civil Rights (Key) 46

Even though Equal Employment Opportunity Commission failed to establish that employer had engaged in racial discrimination in employment, where there was no evidence that Commission proceeded in bad faith or that vexatiousness, abusive conduct, or attempt to harass or embarrass were present in proceedings instituted against employer by Commission, employer was not entitled to award of attorney fees. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

8. Civil Rights (Key) 46

Attorney fee may be allowed as item of costs to prevailing employer in employment discrimination suit brought by Equal Employment Opportunity Commission only where proceeding was instituted in bad faith, without reasonable grounds, or to harass or embarrass employer. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

W. L. Williams, Jr., Mildred Byrd, E. E. O. C., Atlanta Regional Office of Gen. Counsel, Atlanta, Ga., for plaintiff.

Arnold Pyle, Ernest Taylor, Watkins, Pyle, Ludlam, Winter & Stennis, Jackson, Miss., Charles K. Howard, Jr., Atlanta, Ga., Phil McClendon, Crosett, Ark., for Georgia-Pacific.

John Maxey, Danny E. Cupit, Cupit & Maxey, Jackson, Miss., for Paperworkers and Woodworkers.

Charles R. Davis, Thomas, Price, Alston, Jones & Davis, Jackson, Miss., Charles Youngdahl, Youngdahl & Larrison, Little Rock, Ark., for Plyworkers and Article [sic] Bd. Workers.

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge.

This action has been submitted for decision after a full evidentiary hearing at a non-jury trial. The court having considered the evidence introduced and the entire file, now makes the findings of fact and conclusions of law as hereinafter more fully set forth.

I. *The Parties and Plants Involved*

A. Plaintiff.

Plaintiff is the Equal Employment Opportunity Commission (hereafter "EEOC") an agency of the United States charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e, et seq.

B. The Principal Defendant.

Defendant is the Georgia-Pacific Corporation (hereafter "Georgia-Pacific"), a Georgia corporation doing business in Mississippi, in or near the Cities of Louisville, Bay Springs, Gloster, and Taylorsville, where it engages in the growing and harvesting of trees and the manufacture of forest products.

Georgia-Pacific is domiciled in Augusta, Georgia, and has its corporate offices in Portland, Oregon. During all times pertinent to this action, Georgia-Pacific has been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g), and (h) of Title VII, 42 U.S.C.A. §§ 2000e(b), (g) and (h). Georgia-Pacific has continuously since at least July 2, 1965, and does now, employ more than 25 people.

C. Other Defendants.

The following labor unions are parties defendant:[1]

1. The Plywood Workers Local Union No. 3181 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereafter "Local 3181") representing the production and maintenance employees of Georgia-Pacific at its plywood plant at Louisville.

2. The Plywood Workers Local Union No. 2086 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereafter "Local 2086") representing the production and maintenance employees at Georgia-Pacific's plywood plant at Taylorsville.

3. The Particleboard Workers Local Union No. 2153 (hereafter "Local 2153") representing the production and maintenance employees at Georgia-Pacific's particleboard plant at Taylorsville.

4. The United Papermakers and Paperworkers International Union AFL-CIO (hereafter "Paperworkers International").

5. Paperworkers Local Union No. 1076 of the United Papermakers and Paperworkers International Union AFL-

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1. The labor defendants are in this case solely as parties for the purpose of injunctive relief, if any be awarded, pursuant to Fed.R.Civ.P. 19(a)(2).

CIO (hereafter "Local 1076") representing the production and maintenance employees of Georgia-Pacific at its particleboard plant at Louisville.

6. International Woodworkers of America, AFL-CIO (hereafter "International Woodworkers").

7. International Woodworker's Local Union No. 5-349 (hereafter "Local No. 5-349") representing the production and maintenance employees of Georgia-Pacific at its plywood plant at Gloster.

During the time herein pertinent, each of the said labor unions has been and is now a labor organization engaged in an industry affecting commerce within the meaning of Section 701(d) and (e) of Title VII, 42 U.S. C.A. §§ 2000e(d) and (e).

D. Plants involved in action.[2]

The following plants and operations of Georgia-Pacific are involved in the case:

1. Louisville:
   (a) Plywood
   (b) Particleboard plant
   (c) Chemical Plant
   (d) Forestry division
2. Taylorsville:
   (a) Plywood plant
   (b) Particleboard plant
   (c) Chemical Plant
   (d) Forestry operation

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2. The chip-n-saw plant at Bay Springs, the chemical plants and forestry operations at Louisville and Taylorsville, and the forestry operation at Gloster are not unionized.

3. Gloster:
   (a) Plywood plant
   (b) Forestry operation
4. Bay Springs:
   (a) Chip-n-Saw plant

II. HISTORY OF LITIGATION

A. Filing and disposition of charges.

Charges of discrimination in employment practices on account of race were filed with EEOC by several individuals who were employees or former employees of Georgia-Pacific. These charges and the disposition made of them by EEOC are listed as follows:

Date of Filing	Charging Party	Location
1. Sept. 30, 1971	Carlos Marshall	Taylorsville Particleboard
2. March 1, 1972	Daniel Pittman, Jr.	Taylorsville Plywood
3. April 26, 1972	Edward Ray Barnes	Taylorsville Plywood
4. February 7, 1973	Edward L. Nix	Taylorsville Plywood
5. May 23, 1973	Q. C. Jones	Taylorsville Plywood
6. December 5, 1974	Hubert W. Nicholson	Louisville Particleboard
7. August 7, 1972	Fabieus Robinson, Jr.	Gloster Plywood
8. November 5, 1974	Elmyra Peyton	Bay Springs Chip-n-Saw

1. Carlos Marshall.

The complaint of Carlos Marshall was investigated by EEOC and a determination made November 30, 1972, that reasonable cause did not exist to believe that Mr. Marshall was discharged because of his race; however, the EEOC made a determination that reasonable cause existed to believe that Georgia-Pacific was guilty of unlawful employment practices in the hiring, assignment and promotion of black employees.

2. Daniel Pittman, Jr.

The EEOC determined that reasonable cause did not exist for the charge that Pittman was discriminated against on account of his race because he was not hired at the Taylorsville Plywood Plant, however, the EEOC found that reasonable cause existed for the charge that Georgia-Pacific failed to consider him for employment on account of his race at its Particleboard plant at Taylorsville.

3–5. Edward Ray Barnes, Edward Louis Nix and Q. C. Jones.

An investigation was made on the charges filed by Edward Ray Barnes, Edward Louis Nix and Q. C. Jones, against the Taylorsville operation. EEOC found that there did not exist reasonable cause to believe that Georgia-Pacific discriminated against them, or either of them in the manner set forth in the charge. EEOC found, however, that reasonable cause existed to sustain a belief that Georgia-Pacific engaged in employment practices which discriminated against members of the black race.

6. Hubert Nicholson.

Hubert Nicholson's charge related to the Louisville Particleboard operation. The determination was made

that while the available evidence did not support the charge that Nicholson was specifically denied transfer to the position in question, his charge related to alleged violations of a continuing nature. The conclusion was reached that reasonable cause existed to find that Georgia-Pacific had engaged in unlawful employment practices.

7. Elmyra Peyton.

The charge filed by Elmyra Peyton against the chip-n-saw operation at Bay Springs, led to a determination that reasonable cause existed to sustain the charge that the saw mill operation engaged in unlawful employment practices in that Georgia-Pacific maintained a policy of hiring and assigning persons to certain departments and classifications because of their race.

8. Fabieus Robinson, Jr.

Mr. Robinson filed his charge on August 7, 1972. This charge alleged that Mr. Robinson was denied reinstatement to his position of dryer-feeder on account of his race. Mr. Robinson had been terminated on April 4, 1970, and sought to be rehired in the summer of 1971. Mr. Robinson had no further contact with the company between the summer of 1971, and the filing of his charges in 1972. The EEOC found no reasonable cause to believe that Mr. Robinson had been discriminated against by the failure of Georgia-Pacific to rehire him. Mr. Robinson had been discharged on November 6, 1969, for being absent without calling in or sending word. He was not rehired in 1972 because of his past record of absenteeism.

B. The Pleadings.

The complaint filed November 7, 1974, alleges that since July 2, 1965, Georgia-Pacific has continuously and in-

tentionally engaged in unlawful employment practices at its Bay Springs, Gloster, Louisville, and Taylorsville, operations and facilities, in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a). EEOC initially sued Georgia-Pacific, and certain labor organizations, i. e., United Brotherhood of Carpenters and Joiners of America, AFL-CIO (dismissed from the action by the court's order of February 12, 1975), its Local Union 3181, United Papermakers and Paperworkers, AFL-CIO, its Local Union 1076; International Woodworkers of America, AFL-CIO, CLC, and its Local Union 5-349. Thereafter, on May 17, 1976, responding to the court's directive, EEOC filed an Amendment to the Complaint making Plywood Workers Local Union 2083 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Particleboard Workers Local 2153, of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Rule 19(a)(2) defendants.

Georgia-Pacific and the above-named labor unions filed appropriate answers to the complaint as amended.

III. *Location and Type of Facilities Involved, Union Representation*

The location and type of facilities and the union representation at each plant involved in this action are:

A. Louisville.

1. A plywood manufacturing operation; the Southern Council of Industrial Workers and Plywood Local 3181 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

2. A particleboard manufacturing operation; the United Papermakers and Paperworkers International Union, AFL-CIO, and its Local Union Number 1076;

3. A chemical manufacturing operation; no union;

4. A forestry operation; no union.

B. Taylorsville.

1. A plywood manufacturing operation; the Southern Council of Industrial Workers and the Plywood Workers Local 2086 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO;

2. A particleboard manufacturing operation; the Southern Council of Industrial Workers and Particleboard Workers Local 2153 of the United Brotherhood of Carpenters and Joinders [sic] of America, AFL-CIO;

3. A chemical manufacturing operation; no union;

4. A forestry service office; no union.

C. Bay Springs.

1. A "chip-n-saw" manufacturing operation (saw mill); no union.

D. Gloster.

1. A plywood manufacturing operation; the International Woodworkers of America and its Local 5-349;

2. A forestry operation; no union.

IV. *Collective Bargaining Provisions*

A. Georgia-Pacific, prior to 1976, maintained pursuant to its collective bargaining agreements at its Mississippi Particleboard and Plywood operations, departmental seniority for promotion purposes and plant wide seniority for transfer purposes; particularly: Louisville Plywood and Louisville Particleboard, Taylorsville Plywood and

Taylorsville Particleboard and Gloster Plywood. This procedure has continued in these plants with the exception of Gloster Plywood and Louisville Plywood. These plants, pursuant to new collective bargaining agreements which became effective on January 19, 1976, at Louisville, and December 1, 1976, at Gloster, have plant wide seniority system for all purposes.

The labor agreements establish the departmental organization, lines of progression and method of promotion at each facility covered by these labor agreements, as follows:

1. Gloster Plywood.

The production and maintenance hourly employees at this location are represented by Local 5-349 which was certified as the exclusive collective bargaining representative for these employees by the National Labor Relations Board on May 25, 1967. Since that time there have been several labor agreements negotiated with the last and current agreement having a term of three years expiring on December 1, 1979. These agreements established the terms and conditions of the employment relationship between the company and its hourly employees at this work location. These agreements established six departments at this location and provided for progression within each of these departments from lower paying to higher paying jobs on the basis of department seniority. When a permanent opening occurs which cannot be filled through the promotional program such opening is posted for bid and eligible employees may fill out request for transfer to the vacant position. Selection of the employee to fill the opening is made from among those who complete such request on the basis of plant seniority. The contract also estab-

lished maintenance and electrical Trainee positions which are filled on the basis of plant seniority and bid.

2. Louisville Plywood.

Each of the agreements negotiated between the carpenters and the company prior to the last agreement relative to this plant established nine (9) departments. (Log handling, green end, veneer processing, gluing, press section, finishing and shipping, maintenance, boiler house, and clean-up.) Promotions were made automatically on a Departmental Seniority basis from the lower paying to the higher paying job classification in each department provided the senior employee has the ability to perform the work. The contracts further provided for transfer into the entry level positions in each department from the other departments on the basis of plant seniority. Employees therefore have an opportunity to select the department of their choice after hire and initial assignment.

The January 19, 1976, agreement established a plant wide posting bidding system for filling all permanent vacancies in the plant in which plant seniority is the length of service criteria applied.

3. Louisville Particleboard.

The union d endant at this plant, the United Paperworkers International Union, AFL-CIO and its local Union No. 1076, was certified as the exclusive collective bargaining representative on November 27, 1967, by the National Labor Relations Board. The first labor agreement negotiated between the Union and the Company became effective on February 17, 1968. There have been two subsequent 3 year contracts which became effective on February 17, 1971 and February 17, 1974, respectively. These

contracts have set up five departments: namely, process, finishing and shipping, laboratory, maintenance and miscellaneous. Under these contracts, promotions have been made automatically on a departmental seniority basis from the lower paying to the higher paying job classifications in each department provided the senior employee has the ability to perform the work. The contracts further provided for transfer into the entry level positions in each department from the other departments on the basis of plant seniority. Pursuant to this plant-wide system, newly hired employees are offered their choice of entry level jobs in the lines of progression. They may accept or refuse and wait for a vacancy in the line of progression of their choice. Employees therefore have an opportunity to select the department of their choice after hire and initial assignment to the entry level General Labor classification.

4. Taylorsville Plywood.

This agreement established ten (10) departments in the plant: woodyard and lathe, green chain, veneer processing, gluing and pressing, finishing and shipping, power plant, maintenance, stud mill, jitney and general plant.

This agreement creates and utilizes two types of senority, department and plant. Promotions are made on the basis of departmental seniority and occur automatically from the lower to the higher paying jobs in the department after employees already working in the vacant job on another shift have an opportunity to choose the shift of their choice. The entry level jobs in each department are posted plant wide when they become vacant and are filled on the basis of bidding and plant seniority prior to hiring new employees. Employees therefore have an opportunity to select the department and line of progression of their choice after hire and initial assignment.

5. Taylorsville Particleboard.

The agreement established five departments in the plant: process, finishing and shipping, maintenance, mende, and miscellaneous (general helper). New employees are hired and initially assigned to the general helper classification in the Miscellaneous Department. After completion of a probationary period the employee may request a transfer to the entry level job in the department of his choice on the basis of his total length of service. Therefore, employee choice, not company assignment, determines which department a new employee is assigned to. After selecting a department, the employee is promoted along the established line of progression in that department (from lower paying to higher paying jobs) in accordance with his job seniority in the job in which he is working.

V. *Statistics*

A. Plywood Facilities.

1. Louisville Plywood
Summary of hourly workforce as of January 31, 1977:

Total employees			295
White	86		
Black	208		
Indian	1		
		%Black	70.5
Skilled maintenance			
Total			28
White	24		
Black	4		
		%Black	14.3

Non-maintenance positions paying more than $4.00 per hour			
Total			74
White	19		
Black	55		
		%Black	74.3

2. Taylorsville Plywood

Summary of hourly workforce as of January 28, 1977:			
Total employees			311
White	119		
Black	192		
		%Black	61.7
Skilled maintenance positions			
Total employees			35
White	32		
Black	3		
		%Black	8.6
Non-maintenance positions paying over $4.00 an hour			
Total employees			32
White	15		
Black	17		
		%Black	53.1

3. Gloster Plywood

Summary of hourly workforce as of January 28, 1977:

Total employees			291
White	62		
Black	229		
		%Black	78.6
Skilled maintenance			
Total			35
White	30		
Black	5		
		%Black	14.3
Non-maintenance positions paying more than $4.50 an hour			
Total			9
White	3		
Black	6		
		%Black	66.6
Non-maintenance positions paying more than $4.00 an hour			
Total			44
White	13		
Black	31		
		%Black	70.4

B. Saw-Mill Facility.

1. Bay Springs Chip-n-Saw
Summary of hourly workforce as of
January 28, 1977:

Total employees			72
White	25		
Black	47		
		%Black	65.2
Total Skilled Maintenance			7
White	4		
Black	3		
		%Black	42
Maintenance Department			
Total Employees			6
White	4		
Black	2		
		%Black	33.3
Highest Paid Positions:			
Hourly Rate			5.26
White	1		
Black	1		
		Total	2
Hourly Rate			4.50
White	4		
Black	3		
		Total	7
Total all highest paid positions			9
White	5		
Black	4		
		%Black	44

C. Particleboard Facilities.

1. Taylorsville

Summary of workforce as of March 1, 1976:

Department	Total	Black	White
Process	21	6	15
Finishing & Shipping	18	3	15
Maintenance	22	0	22
Miscellaneous	19	9	10
Mende*	0	0	0
		(23% Black)	

*shut down

2. Louisville

Department	Total	Black	White
Process	21	8	13
Finishing & Shipping	14	7	7
Laboratory	4	0	4
Maintenance	19	0	19
Miscellaneous (Entry Level)	37	26	11
	95	41	54
	(43% Black)		

D. Forestry Operation.

1. Louisville

a. Summary of hourly employees as of January 31, 1977:

Name	Race	Job Title	Employment Date
Boydstun, Richard H.	W	Woodsman	12-19-66
Flucher, Freddy N.	W	Woodsman	5-16-68
Goss, Jr., Willie	B	Woodsman	9-25-74
Roberson, Charles D.	B	Woodsman	8-27-75
Stokes, Carvel E.	W	Woodsman	1-04-66
Waddell, Larry L.	W	Woodsman	2-01-66
Warner, Jr., Carlos B.	B	Woodsman	11-30-73

b. Summary of employees as of March 1, 1976:

(1) Salaried employees: 12

White	12		
Black	0		
		%Black	0

(2) Hourly employees:

White	9		
Black	5		
		%Black	55 [sic]

E. Chemical Facilities.

1. Taylorsville

Summary of hourly workforce employees as of March 1, 1976:

Total employees:		23
White	15	
Black	8	
	%Black	35

F. Miscellaneous Statistics.

As of March 1, 1976, defendant Georgia-Pacific had no blacks employed in skilled maintenance positions (including electricians, millwrights, millwright trainees) in its Taylorsville Particleboard and Louisville Particleboard operations.

As of March 1, 1976, defendant Georgia-Pacific had 3 blacks employed in skilled maintenance jobs at its Taylorsville Plywood operation, 5 black skilled maintenance employees in its Louisville Plywood operations, and 2 black skilled maintenance employees (1 millwright and 1 sawfiler) employed in its Bay Springs operation.

As of March 1, 1976, defendant Georgia-Pacific employed one black supervisor in its Taylorsville Particleboard operation; two black (of 22 supervisors) supervisors in its Taylorsville Plywood operation; and three black (of 17 supervisors), supervisors in its Louisville Plywood operation.

As of March 1, 1976, defendant Georgia-Pacific employed no black clericals in its operations as follows: Bay Springs, Taylorsville Particleboard, Taylorsville Chemical, Taylorsville Forestry, Gloster Forestry, Louisville Particleboard, Louisville Chemical.

The workforce availability statistics and percentages set forth in the exhibits introduced in evidence are:

1. Bay Springs.

Bay Springs is located in Jasper County near the Smith County Line. The workforce for the Bay Springs saw mill primarily comes from Jasper County. According to the 1970 census, the total labor force for Jasper County was 5850 of whom 2140 are black. Therefore 37% of the total labor force population in this county is black. Persons working as craftsmen, foremen and related jobs total 691; 134 of whom are black (19% black).

2. Gloster.

Gloster, Mississippi, is located in Amite County from which the majority of the workforce is hired. According to the 1970 census, the total workforce population for Amite County is 3,948, 1,627 (41.2%) of which are black. Moreover, 574 of this 3,948 are skilled craftsmen and 150 of the 574 are black (26%).

3. Louisville.

Louisville, Mississippi, is located in Winston County. According to the 1970 census, the total workforce population sixteen years of age and older for Winston County is 5,907 of which 1731 are black (29.00% black). The workforce population sixteen years of age and older in the eight county area immediately around Louisville is 42,827, of which 14,039 is black (32.7%). Moreover, 761 of this 5,907 were skilled craftsmen and 118 of the 761 were black (15.5% black).

4. Taylorsville.

Taylorsville, Mississippi, is located in the southern part of Smith County. The four counties bordering Smith

County on the south, east and west are Jasper, Jones, Covington and Simpson. According to the 1970 census, the total workforce population for Smith County is 4,731, 876 whom are black (19% black). The five county area workforce population is 40,551; of which 9,511 are black (23.45% black).

The skilled craftsmen workforce population for Smith County totaled 672, of which 64 was black (9.5% black). The five county skilled craftsmen workforce population was 5,710 of which 631 was black (11.05% black).

VI. *General Findings*

[I] Georgia-Pacific started its Mississippi operations in the mid-1960's, subsequent to the effective date of Title VII, July 2, 1965. The initial undertaking was to establish a forestry operation at Louisville, Mississippi. This undertaking was followed by the construction of a plywood plant in 1966, a particleboard plant in 1967, and a chemical plant in 1968 at Louisville. Georgia-Pacific instituted a forestry operation in 1966 and a plywood plant in 1967 in Gloster; a forestry operation in 1969 or 1970, a plywood plant in 1970, a particleboard plant in 1971 and a chemical plant in 1972 in Taylorsville; and finally, a chip-n-saw mill (saw mill) in Bay Springs in 1973.

The two chemical plants, one at Louisville, the other at Taylorsville, are not part of the company's Crossett Division, but are in the Southwest Division of the chemical operations. They report directly to Chemical Management of the Southwest Division which reports to Portland, Oregon. All other operations are a part of the Crossett Division, but are supervised by separate and independent management personnel.

Georgia-Pacific maintains separate personnel functions, policies and practices at each plant or operation. At

Louisville and Taylorsville where Georgia-Pacific has both a plywood and a particleboard plant, there is a separate collective bargaining agreement governing the personnel practice in each plant.

From the inception of the particleboard and plywood plants at Louisville and Taylorsville, Georgia-Pacific has not allowed hourly employees to transfer from one plant to the other and has maintained the two operations as separate and distinct. The reason the company has done so is that if employees had been allowed to transfer from plywood to particleboard, the company would have suffered substantial economic loss as a result of retraining cost, lost efficiency and lower production of its higher profit cement form plywood.

The manufacturing process and the jobs performed at the two plants are vastly different. There are different production jobs performed and the structuring of the departments is different. The quality control and the maintenance personnel at these plants perform different types of work. Different raw materials are used in the manufacturing processes. The technology, methods and processes of production are different. Different products are produced for different markets and customers. Each plywood plant employs approximately three times as many employees as a particleboard plant.

The evidence establishes that the cost of retraining and loss of production if the plant personnel were combined would be great. All employees, including maintenance, would have to be retrained in order to work with the vastly different machines and production processes. The particleboard production process is much more technical than the plywood process. As a result of the type of process and because of the number of reports that employees must be able to fill out and comprehend, the company has required

particleboard employees to be able to read and write although there is no required educational level. There are no minimum requirements for employment at the plywood plants and the chip-n-saw mill. The particleboard plants have also suffered major economic setbacks which required a number of employees to be laid off. As a result of these layoffs, there have been very few job openings at any level, and especially in the supervisory, maintenance and other higher paying jobs.

The company's two chemical plants are basically similar although Taylorsville plant manufactures formaldehyde as well as chemical resins. Employees in entry level jobs must be able to read, write and perform basic mathematical functions. In order to progress, employees must learn to identify and safely work with dangerous chemicals, and perform laboratory tests which require the use of algebra and other mathematical formulas. These are small operations in terms of personnel size and only one or two employees are hired each year. There are no artificial barriers to employment and an applicant must, because of the extremely hazardous nature of this work, be proficient in reading, writing and basic mathematics. Each plant has always hired and promoted qualified blacks. There is no evidence of any black being denied a job or a promotion which was given to a lesser or equally qualified white. No charges of discrimination have been filed against these plants.

The forestry operations have the responsibility for procuring timber for the company's plants and for the reforestation and maintenance of the woodlands the company owns and leases in the respective areas of Mississippi. There are two basic types of salaried employees. These are professional foresters who, of necessity, have college degrees in forestry and other forestry employees with ex-

tensive experience in forestry management including positions such as timber buyer and technician. There are also hourly employees who perform manual labor and other necessary duties in maintaining the forests. There has never been a black applicant for the professional forester position at any of the three locations even though attempts have been made to recruit such applicants. The company has taken affirmative steps to seek and employ blacks at each location.

Jobs in the forestry operation require extensive travel to and from work areas and most of the work is performed in rural wooded areas. In addition, the pay rates for the forestry operation are substantially below that of the rates at the Gloster, Louisville, and Taylorsville manufacturing plants. These operations have a small number of employees and there has been a relatively small turnover of employees. Blacks have been hired at each location as they applied. There is no evidence of any black being rejected for a job that was given to a lesser or equally qualified white. No employment discrimination charge has ever been filed against any of the forestry operations and the Commission has never issued any determination that the employment practices at the forestry operations are racially discriminatory in any manner.

The evidence reflects that from the beginning Georgia-Pacific endeavored to comply with the mandate of Title VII to provide nondiscriminatory employment to all qualified applicants for work at its several plants and operations, and to refrain from unlawful employment practices proscribed by 42 U.S.C. § 2000e-2(a). To accomplish this purpose a policy was established at each of the subject plants and operations to make known to the public and prospective job applicants, that Georgia-Pacific is an "equal employment opportunity employer" and to

recruit and train qualified employees without regard to race. To accomplish this purpose Georgia-Pacific sought the assistance of leaders in both the white and black communities in which its operations are conducted, advertised as an "equal employment opportunity employer" in newspaper and magazines having general circulations in the community, visited schools, universities, employment offices, and other known sources of minority applicants.

The company is in the wood processing business and manufactures plywood, particleboard, chemical resins and compounds and variable dimension lumber. The basic wood utilized in the various processes (other than chemical) is Southern Pine. Therefore, the plants are located in rural Mississippi to be near this raw material. These rural areas were primarily agriculturally oriented prior to the company's arrival. Therefore, there were limited numbers of persons having previous industrial experience. This was particularly true of skilled and supervisory personnel and those who were available in the areas as the new plants opened who possessed experience in the skilled trades or had previous supervisory experience were virtually all white.

The company solved this problem in several ways. First, it imported or transferred skilled and supervisory personnel from other plants, primarily from the Pacific Northwest where the company owned and operated plywood and other wood product plants. Second, it hired skilled maintenance personnel from the construction crews which built the plants. Third, it recruited and hired experienced skilled and supervisory personnel from in and around Mississippi; and fourth, it trained and promoted employees who were hired into the non-skilled and non-supervisory hourly ranks because they did not possess the necessary skills and experience at time of original hire.

The company was unable to locate and hire many experienced black persons for its skilled maintenance and supervisory positions as it opened and operated its plants. The evidence reflects, however, that several maintenance personnel were employed by the company when the plants at Taylorsville and Bay Springs were opened. Therefore, it has been necessary, in order to place blacks into these positions for the company to seek out and train hourly employees. The company has utilized both on-the-job training and formal training programs in the plants as well as providing financial assistance for employees to attend vocational training centers to learn skilled jobs. These efforts have resulted in the promotion of numerous black hourly employees to skilled and supervisory positions. Offers have been made to other black employees for promotion to maintenance and supervisory positions and black employees are regularly consulted by management concerning the identity of black employees who have the skills or desire to promote to such positions.

Moreover, black employees hold the highest paying hourly positions in virtually all the plants involved in this litigation. Thus black employees have been able to successfully compete for these higher paying positions and have not been excluded therefrom by any artificial barriers.

The company also employs blacks at each of its locations in percentages which equal or exceed the availability of blacks in the workforce in the areas from which it hires its employees.

The company, through its personnel representatives has been active in establishing programs to assist black colleges in curriculum development in an effort to assist in better preparing the graduates of these colleges for careers in management after graduation.

Georgia-Pacific's exhibits reflect or summarize all openings which occurred over a period of time, seniority dates of applicants, experience and qualifications of applicants, the identity of the successful applicant, the identity of unsuccessful applicants, and other relevant data. These exhibits clearly reflect that black employees have not been excluded from any positions, including the company's skilled, supervisory and laboratory positions. These exhibits also reflect that in instances where white employees were awarded positions over black employees, that the white employees were better qualified by prior job related experience or had more seniority.

The EEOC presented the claims and testimony of 5 of the 8 persons who had filed charges that are involved in the action sub judice. These are Edward Ray Barnes, Q. C. Jones, Carlos Marshall, Hubert Nicholson and Elmyra Peyton. As has been noted hereinbefore, the EEOC in its administrative determinations found no reasonable cause to sustain the charges of any of the charging parties, except Elmyra Peyton.

Elmyra Peyton. Ms. Peyton's testimony was in direct conflict with that of the plant superintendent and secretary at the Bay Springs chip-n-saw mill where she was employed. In her charging affidavit, Ms. Peyton stated that persons of the black race, including herself, had been fired because of race.

The incident which triggered the charge involved a certificate of her physician as to an illness during a period when she was absent from work. The record reflects that on or about July 5, 1974, she asked to be excused from work because of illness. She presented a note from her physician which stated that she was to return to work July 8. The supervisor refused to excuse her and dis-

charged her because of her absence. The physician's name was stamped but not written on the note. Stamped medical excuses were not acceptable to the company and Ms. Peyton had been given notice of the position of the company in this regard. She was given an opportunity to secure a signed excuse before her termination, but chose not to do so. The plant superintendent testified that when Ms. Peyton left the mill premises she was accompanied by a man and they were traveling in a direction away from instead of going toward her home as she testified she did. The record reflects that while approximately 80% of employees under the supervision of Ms. Peyton's supervisor were black, the record also shows that Ms. Peyton testified that the department on her shift was approximately all black. The court concludes that the percentage of blacks discharged by the supervisor was at a lesser rate than their representation in that department and shift.

Hubert Nicholson. The evidence does not sustain the charge of Mr. Nicholson that Georgia-Pacific discriminated against him or other members of his race in promotions, assignments and hirings at its Louisville Particleboard plant. The testimony reflects that Mr. Nicholson requested a transfer to Mechanic Trainee position on November 20, 1973, and again on May 24, 1974. There were no openings in this position on either date. At a later date in 1976, a vacancy in this position was filled by an applicant with more seniority than Mr. Nicholson.

Carlos Marshall. Mr. Marshall's charge filed with EEOC stated that he was discharged by Georgia-Pacific at its Taylorsville Particleboard plant because of his race and that the company discriminated against blacks with respect to hiring, job classifications and work assignments. The evidence does not sustain the charge that Mr. Marshall was subjected to any discriminatory employment practices on account of race.

Edward Ray Barnes. Mr. Barnes claimed in his charge filed with EEOC that he was discharged by Georgia-Pacific at its Taylorsville plywood plant because of his race. The testimony shows that he was discharged when caught sleeping on the job, and that like treatment had been given to white employees under similar conditions. The court concludes that Georgia-Pacific did not discriminate against Mr. Barnes because of his race, and that his charges have not been sustained by the evidence presented to the court.

Q. C. Jones. Mr. Jones complained to the EEOC that Georgia-Pacific had discharged him from his employment at Georgia-Pacific's Taylorsville plywood plant because of his race (black) and that he was not afforded workmen compensation benefits because of his race. The testimony introduced and documents received in evidence are not sufficient to support the contention of Mr. Jones.

Edward L. Nix, Daniel Pittman, Jr., and *Fabieus Robinson.* The evidence in the case does not support the claims of these charging parties, who did not appear as witnesses at the trial.

Conclusions of Law

Georgia-Pacific, on April 10, 1975, filed a motion to dismiss with respect to the employment practices at its Bay Springs and Louisville plants on the ground that the EEOC had failed to meet and satisfy the jurisdictional prerequisites required by Section 2000e-5(b) of the Act, 42 U.S.C.A. § 2000e-5(b) and its own procedural regulations published at 29 C.F.R. § 1601.23. The response of EEOC stated that it had under investigation, pending at the time, charges of employment discrimination filed against Georgia-Pacific's Bay Springs and Louisville plants. There had been no determination made by EEOC and

no effort had been made to conciliate the matter. EEOC cited the refusal of Georgia-Pacific to cooperate with the commission in its efforts to investigate the charges. EEOC contended that the motion should be overruled and EEOC should be allowed to proceed with respects to the Bay Springs and Louisville operations for such a course would void duplicitous actions and allow the action sub judice to resolve all questions with regard to discriminatory employment practices at all of Georgia-Pacific's Mississippi facilities at one time. The motion was overruled and the action proceeded to a final hearing with respects to all of Georgia-Pacific's facilities at Bay Springs, Gloster, Taylorsville and Louisville.

Georgia-Pacific has incorporated in its proposed findings of fact and conclusions of law a finding that the action should be dismissed for failure of EEOC to meet the jurisdictional requirements of 42 U.S.C.A. § 2000e-5 (f)(1), with respect to the forestry and chemical operations, the plants at Bay Springs and Louisville and the plywood plant at Gloster. The testimony shows that no charges have been made at any time with respect to either the forestry operations or the chemical plants at all locations. The only charge (Hubert W. Nicholson) filed with respect to the Louisville particleboard plant was filed December 5, 1974, after this action was filed by EEOC, on November 7, 1974. There has been no charge filed against the plywood plant at Louisville. The charge (Elmyra Peyton) against the Bay Springs saw mill was filed November 5, 1974, two days before the filing of this action. The charge of Fabieus Robinson, Jr. with respect to the plywood plant at Gloster was not timely filed.

[2] Georgia-Pacific, contends that EEOC is without authority to institute the action sub judice with respects

to the plants just mentioned because the charges had not been taken through the administrative process required by 42 U.S.C.A. § 2000e-5(f)(1), citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Equal Emp. Op. Com'n v. Louisville and Nashville R. Co.*, 505 F.2d 610, 616 (5th Cir. 1974), *reh. den.* 508 F.2d 842 (5th Cir. 1975); *EEOC v. Raymond Metal Products Company*, 530 F.2d 590, 592 (4th Cir. 1976). In *Raymond Metal Products, supra* the court said:

> After an aggrieved person or a member of the commission has filed a charge against an employer or a labor organization alleging an unfair employment practice, Title VII requires the commission to complete a four-step procedure before commencing judicial action. These steps are service of a notice of the charge, investigation, determination of whether there is reasonable cause to believe the charge is true, and endeavors to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The commission can institute suit only if it has been unable to secure an acceptable conciliation agreement.

530 F.2d at 592. (footnotes omitted)

The position of Georgia-Pacific would undoubtedly be correct if each charge is considered in isolation. A different picture is presented, however, where there exists a single industry with operations at separate locations, but all subject to one source of supervision and control. The court's action on the motion to dismiss was dictated in reliance upon the well-known and generally accepted rule announced by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), where the late Mr. Justice Black, speaking for an unanimous court, said:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint

> should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

355 U.S. at 45, 78 S.Ct. at 102, 2 L.Ed.2d at 84. (footnote omitted)

The parties have labored long and well to adequately present this case to the court. The trial was lengthy and expensive for everyone, in time and money. All issues have been thoroughly explored. It would be unwise and wasteful of judicial effort for the court to give further consideration to the issue thus presented. The court's duty is to proceed to decide the issues properly presented by the record.

[3] The initial burden rests with the EEOC to prove by a preponderance of the evidence that Georgia-Pacific has intentionally engaged in or is intentionally engaging in an unlawful employment practice. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396, 416 (1977) (hereafter "Teamsters"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668, 677 (1973); *United States v. Jacksonville Terminal Company*, 451 F.2d 418, 443 (5th Cir. 1971), *cert. den.* 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *Hodgson v. First Fed. Sav. and L. Ass'n of Broward Co., Fla.*, 455 F.2d 818, 822 (5th Cir. 1972).

[4] When racial discrimination in employment practices is alleged, the plaintiff must first establish a prima facie case of discrimination before the burden of producing evidence shifts to defendant.

[5] Once plaintiff has established a prima facie case, the burden then shifts to defendant to prove legitimate,

non-discriminatory reasons for his actions by a preponderance of the evidence. Upon proper proof of a legitimate reason for the employer's action, plaintiff then bears the burden of proving by a preponderance of the evidence that the articulated reasons are a pretext for racial discrimination. *Teamsters, supra; McDonnell Douglas, supra; Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977).

The burden in the action sub judice rested initially upon EEOC to prove by a preponderance of the evidence that Georgia-Pacific has intentionally engaged in or is intentionally engaging in a practice or pattern of racial discrimination with respect to its employees in hiring, assignment, promotion, discharges and the infliction of penalties for infraction of company rules. To meet this burden EEOC introduced statistical evidence as well as testimony from individuals.

[6] It is "unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role', . . ." *Teamsters, supra,* 431 U.S. at 339, 97 S.Ct. at 1856, 52 L.Ed.2d at 417. Where statistics are received in evidence the court will listen. Statistics are often sufficient within themselves, to make a prima facie case of discrimination. *Teamsters, supra,* 431 U.S. at 337, 97 S.Ct. at 1855, 52 L.Ed. 2d at 417; *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 328-9 (5th Cir. 1977) rev'g 394 F.Supp. 434 (N.D.Ala.1975); *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508, 516-17 (5th Cir. 1976).

The EEOC and Georgia-Pacific have introduced statistical evidence which covers a period of time beginning in 1971 and extending to within a few days of the trial. Individuals have testified who were or are employees of Georgia-Pacific at most, if not all, of the plants involved.

Georgia-Pacific produced witnesses from its managerial and supervisory staffs from each location; also, other employees. A discussion of the evidence in detail is unnecessary and would unduly prolong this memorandum.

There are instances where the statistics reflect an under-representation of blacks in Georgia-Pacific's overall workforce, i.e., the following categories: (1) plant management (2) office personnel (3) clerical help (4) mechanical maintenance (5) electrical maintenance (6) supervisory positions, (7) chemical plant personnel and (8) forestry salaried employees.

Applying the above findings of fact and conclusions of law the court finds:

1. That Georgia-Pacific did not discharge Elmyra Peyton from its Bay Springs saw mill because of her race or color; that she voluntarily terminated her employment with Georgia-Pacific on July 5, 1974; that no violation of 42 U.S.C.A. § 2000e, et seq. was committed by Georgia-Pacific in regard to Elmyra Peyton;

2. That Fabieus Robinson, Jr. was not discharged by Georgia-Pacific from its Gloster Plywood plant because of his race or color, nor was he refused employment because of his race or color;

3. That Georgia-Pacific did not fail or refuse to hire Daniel Pittman, Jr., at its Taylorsville plywood or particleboard plants because of his race or color;

4. That Carlos Marshall was not discharged from the Taylorsville particleboard plant of Georgia-Pacific because of his race or color;

5. That Edward Ray Barnes was discharged from the Taylorsville plywood plant of Georgia-Pacific on April 18, 1972, because he was found sleeping on the job and not because of his race or color;

6. That Q. C. Jones was discharged from Georgia-Pacific Taylorsville plywood plant on January 3, 1973, because he was absent from work without calling in, that he was not discharged because of his race or color; that Jones was not denied workmen's compensation benefits because of his race or color;

7. That Edward L. Nix made application for employment with Georgia-Pacific at its Taylorsville operation on October 27, 1972, and was not hired; but this failure to hire Nix was not because of his race or color;

8. That Hubert Nicholson was not denied a maintenance position at Georgia-Pacific's particleboard plant at Louisville, because of his race or color; that no vacancies occurred for such position between the time Nicholson made his application and the date of the determination by EEOC, December 1, 1975;

9. That the statistical evidence does not reflect a disparity between the percentage of blacks hired and the percentage of blacks in the relevant available workforce at any of Georgia-Pacific's operation; *Robinson v. Union Carbide Corp., Materials Systems Div.*, 380 F.Supp. 731, 743 (S.D.Ala.1974); citing *United States v. Jacksonville Terminal Co., Inc., supra;* that the evidence as a whole does not establish that Georgia-Pacific has failed or refused to hire black persons because of their race or color;

10. That the statistics received in evidence do not reflect that black employees have been assigned to lower paying or less desirable job classification because of their race or color; that the evidence as a whole does not show that Georgia-Pacific has assigned employees to lower paying or less desirable job classifications because of their race or color;

11. That the statistics received in evidence in this action do not reflect that black employees have been refused promotion or have been denied the opportunity for promotions to higher paying or more desirable job classifications because of their race or color; that the evidence as a whole does not show that Georgia-Pacific has failed or refused to promote black employees or has failed or refused to give black employees the opportunities for promotions to higher paying or more desirable job classifications because of their race or color;

12. That neither the statistics presented in this action nor the evidence as a whole reflect that Georgia-Pacific has discharged black employees from their employment because of their race or color;

13. That the statistics presented in this action do not reflect that black employees were paid lower wages or other forms of compensation than were white employees because of the black employees' race or color; that the evidence as a whole does not show that black employees were paid lower wages or other forms of compensation than white employees because of the black employees' race or color;

14. That the statistics presented in this action do not reflect that a policy or practice of discharging employees due to garnishment has a disproportionate effect on black employees, as a group, or that such a policy or practice is unlawful under 42 U.S.C.A. § 2000e, et seq.; that the evidence as a whole does not show that Georgia-Pacific maintained a policy or practice of discharging employees due to garnishment at any time material or relevant to this action;

15. That the statistics presented in this action do not reflect that Georgia-Pacific has maintained separate lines

of seniority for black and white employees at its operations. The statistics do not reflect that any employee was discriminated against as to his or her seniority and its attendant rights and privileges because of his or her race or color. The statistics presented do not reflect that any employee was deprived or denied training or any other favorable term or condition of employment or the opportunity for training or any other favorable term or condition of employment because of his or her race or color; that the evidence as a whole does not show that any employee was denied any seniority with its attendant rights and privileges because of the employee's race or color nor was any employee denied or deprived of any training or any other favorable term or condition of employment or the opportunity for training or any other favorable term or condition of employment because of the employee's race or color; that the evidence does not show that Georgia-Pacific has maintained separate lines of seniority at its operations because of the race or color of its employees;

16. That the statistics presented in this suit do not reflect that any employee was discriminated against because that employee either opposed an employment practice made unlawful by 42 U.S.C.A. § 2000e et seq. or because that employee filed a charge, testified, assisted or participated in an investigation, proceeding or hearing under 42 U.S.C.A. §§ 2000e et seq., that the evidence as a whole does not show that Georgia-Pacific discriminated against any employee because that employee either opposed an employment practice made unlawful by 42 U.S.C.A. §§ 2000e et seq., or because that employee filed a charge, testified, assisted or participated in an investigation, proceeding or hearing under 42 U.S.C.A. §§ 2000e et seq.; and

17. That the court, after reviewing the evidence as a whole, concludes that the plaintiff has failed to show, by a preponderance of the evidence, that Georgia-Pacific has engaged in employment practices in violation of 42 U.S.C.A. §§ 2000e et seq.

Georgia-Pacific proposes a finding of fact that it is entitled to recover a reasonable attorneys fee for defending the action sub judice pursuant to 42 U.S.C.A. § 2000e-5(k), which provides:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Georgia-Pacific supports its request with the following cases: *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 9th Cir. 1974); *United States Steel Corp. v. United States*, 519 F.2d 359, 362 (3rd Cir. 1975); *EEOC v. C & D Sportswear Corp.*, 398 F.Supp. 300 (M.D.Ga. 1975).

Attorney fees, if allowable, are taxed as costs under the statute. In each of the cited cases, the court found extreme conditions to exist. Chief Judge Elliott of the Middle District of Georgia, in *C & D Sportswear Corp., supra*, based the award of attorney's fee on a finding that the suit was not necessary to protect any substantial public interest. Judge Elliott said:

> The court makes no determination with regard to whether this litigation was instituted by the Commission in bad faith, not finding it necessary to do so. What the Court does determine is that this was clearly not necessary litigation dictated by any substantial public interest. In this case the Commission sued to

> redress an alleged unlawful employment practice which occurred more than five and one half years prior to the institution of suit, and the alleged practice was not a "systemic" one which affected a number of employees nor was it one of a series of alleged unlawful employment practices. Instead, it affected only one individual who, having been given notice of her right to sue years ago, nevertheless failed to pursue it.

398 F.Supp. at 307.

The court does not find that the action sub judice comes within the ambit of cases such as described by Judge Elliott.

The Ninth Circuit case of *Van Hoomissen, supra,* involved the allowance of an attorney fee against EEOC after it had been allowed to intervene in Van Hoomissen's private suit against Xerox. In its intervention complaint, EEOC alleged that Xerox both engaged in discriminatory hiring practices and had unlawfully retaliated against Van Hoomissen. The district court granted leave to intervene, limited to the issue of retaliation. The appeal of EEOC was dismissed by the Ninth Circuit in *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180 (9th Cir. 1974). Xerox then petitioned the Ninth Circuit for an award of attorney's fees as part of its costs on appeal, pursuant to Section 706(k) of the Act. [42 U.S.C.A. § 2000e-5(k). The court held in effect that the section, on its face, authorized an award of attorney's fees against the Commission which could be exercised in the discretion of the court. An attorney's fee was awarded. To the court's unpublished order denying rehearing en banc, filed November 6, 1974, contained the statement that "[t]he court in allowing attorney's fees was mindful that the appeal by EEOC was vexatious and prosecuted on highly questionable grounds."

See, United States Steel Corporation v. United States, supra, at page 364, footnote 23.

The Third Circuit in *United States Steel Corporation v. United States, supra,* was confronted with two principal questions. First, is the award of attorney's fees authorized against the EEOC in a proceeding under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (1974). Second, assuming that such an award is permitted, what is the standard for imposing or denying the award.

The Third Circuit followed the reasoning of the Ninth Circuit in *Van Hoomissen* and held that "accepting the straightforward meaning of Section 706(k), a court may award an attorney's fee to a private party that prevail against EEOC in a proceeding." 519 F.2d at 362 (footnote omitted)

The district court in *United States Steel* denied the award of an attorney's fee against EEOC. The Third Circuit affirmed the district court's decision. The court said:

> A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in *Piggy Park* [*Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)] one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations. A factor frequently considered in awarding an attorney's fee is the proper conduct of a plaintiff. The standard of improper conduct, it would seem, would apply against the EEOC much as it would

against a private party. Where a court finds that a proceeding was maintained in bad faith, imposition of a counsel fee against a government plaintiff may be appropriate.

* * *

Here the district court concluded that the Commission undertook "a bona fide effort to seek information." The indicia associated with the grant of an attorney's fee—vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass—were absent. We do not find the district court's formulation of the standard to be erroneous. Rather, its decision not to award counsel fees is indicated by its findings.

519 F.2d at 364. (footnotes omitted)

The court concludes that the proper rule with regard to the allowance of an attorney's fee as an item of costs to a prevailing defendant when sued by EEOC under Title VII, is expressed by the Third Circuit in *United States Steel, supra.*

When the rule is applied to the facts in the action sub judice, the court finds that Georgia-Pacific is not entitled to an award of attorney's fee as an item of costs.

[7, 8] The record does not justify a holding that EEOC proceeded against Georgia-Pacific in bad faith, or that vexatiousness, abusive conduct, or an attempt to harass or embarrass were present in the proceedings instituted against Georgia-Pacific by EEOC. Charged with the duty of eliminating racial discrimination in private employment, the court has concluded that EEOC should not be held to the same standard as applied in cases where a victim must bring an action to curtail or eliminate racial discrimination.

Only in cases where the proceeding is instituted in bad faith, without reasonable grounds, or to harass or embarrass the responding party, is the court justified in making such an award. The facts in the action sub judice do not bring EEOC within this holding. The request for the allowance of an attorney fee will be disallowed.

An order on the attorney fee issue will be entered by the court and the clerk with [sic] enter the final judgment dismissing the complaint on the merit's at plaintiffs' costs.

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No. 83-840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

ROBERT BOYKIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPPOSITION ON BEHALF OF RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-840

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

ROBERT BOYKIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPPOSITION ON BEHALF OF RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF CASE

The facts relevant to this Opposition are included in the Reasons Why the Writ Should Not Be Granted.[1]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. No Important Question of Law is Raised in the Petition.

The first two questions presented by the Petition are whether the court of appeals correctly applied this Court's decision in *Pullman-Standard Co. v. Swint*, 456 U.S. 273 (1982), regarding the "clearly erroneous" standard of Rule 52, F. R. Civ. P. The question of whether *Swint* was properly applied in a particular case is not a question of general importance warranting review by this Court, even if it did arise in this case. But see Part 2,

[1] It should be noted that the opinion of the United States District Court for the Northern District of Mississippi in *EEOC v. Georgia-Pacific Corp.*, reprinted as Appendix D to the Petition, is an unrelated case not involving the sawmill in Columbia, Mississippi that is the subject of this action. See A79-A80. ("A——" citations refer to the Appendix to the Petition.)

infra. Nor does the question of class certification presented by the Petition involve any significant legal issues that would warrant the exercise of *certiorari* jurisdiction. See Part 4, *infra*.

2. The Court of Appeals Did Not Overturn Any Findings of Fact.

The Petition proceeds on a mistaken premise. The court of appeals did not overturn any factual findings of the district court. That there is no issue in this case of the application of Rule 52 is made clear by a review of the evidence and the decisionmaking below.

Plaintiffs' class claim is that black employees at the defendant's sawmill in Columbia, Mississippi are discriminatorily excluded from the higher-paying jobs.[2] In support of this claim, plaintiffs introduced statistical evidence that showed, over the six-year period from the opening of the plant in 1970 to the close of discovery in 1976, that a disproportionately small number of black employees at the sawmill had been assigned to work at the higher-paying jobs.[3] Expert testimony showed that

[2] There are 60-70 hourly employees on a single shift at defendant's sawmill. About one half of these jobs are "utility" positions, and these are the lowest-paid jobs in the sawmill. A31, 40. In this Opposition, plaintiffs use the phrase "higher-paying jobs" to refer to all of the jobs at the sawmill other than the utility job.

[3] The following Tables reflect the initial assignment and the promotion of employees by race over the six-year period, 1970-1976.

Table I

Number and Percentage by Race of Employees
Whose Initial Assignment Was Above the Utility Position

Race	Total Number Employed	Number Initially Assigned Above Utility	Percentage Initially Assigned Above Utility
White	444	90	20.3%
Black	317	22	6.9%

[Footnote continued on page 3]

the statistical disparities were significant to a high degree and sufficient to raise an inference of discrimination under the standards later approved by this Court in *Castaneda v. Partida*, 430 U.S. 482, 496, n.17 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299, 311, n.17 (1977). See 706 F.2d at 1391, n.3, A15, n.3.[4]

[Continued]

Table VI

Number and Percentage by Race of Employees in the Utility Position Who Were Promoted to Higher-Paying Job

Race	Number of non-probationary employees whose initial assignment was in Utility	Number who were promoted out of Utility	Percentage who were promoted out of Utility
White	178	84	47.2%
Black	157	42	26.8%

All of plaintiffs' statistical evidence is reprinted in the opinion of the court of appeals, at A9-A13. There was no dispute with respect to the accuracy of the figures in plaintiffs' statistical calculations. 706 F.2d at 1391, A16.

[4] Plaintiffs bolstered the statistical evidence of discrimination in several respects:

"According to the testimony of defendant's Plant Manager, prior experience or education outside the sawmill was not necessary to the assignment to the better-paying jobs. These jobs could be learned and were learned through on-the-job training. The testimony of the Plant Manager on this point is reprinted in the opinion of the court of appeals, 706 F.2d at 1392, n. 5, A17-A18, n. 5.

"There was no system of notification within the plant of the availability of higher-paying jobs, and no procedure for applying for a higher-pay job. There were no established qualification or experience requirements. All employment decisions were made by white supervisors in their subjective discretion. 706 F.2d at 1386.

[Footnote continued on page 4]

The Magistrate who tried and decided the case found that plaintiffs' evidence did not establish a *prima facie* case of class-wide discrimination because of two problems he perceived in plaintiffs' statistical evidence. First, he ruled that the work force at defendant's sawmill was too small to permit useful statistical analysis. A67. Second, he ruled that the statistical evidence did not give rise to an inference of discrimination because it did not properly account for differences in the qualifications of white and black employees. A41, A67. The Magistrate further found that any inference of discrimination that did arise from plaintiffs' evidence was rebutted by defendant's evidence bearing on specific assignment decisions. A57.

The court of appeals rejected each of these conclusions of the Magistrate. With respect to the statistical evidence, the court of appeals held that the proper focus was not the size of the defendant's work force at any single time, but the number of assignment decisions within the period covered by the suit, and that the number of observations and the size of the disparities reflected in plaintiffs' tabulations were sufficiently large to give rise to an inference of discrimination. See pp. 6-7, *infra*. The court of appeals further found that, because prior related experience was not necessary to assignment to the higher-paying jobs at the sawmill, the statistical evidence gave rise to an inference of discrimination with-

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[Continued]

A6. See also Pl. Exh. 41, pp. 25-33 (Deposition of Plant Manager); Tr. 1026-32 (Trial testimony of Plant Manager).

* There was testimony from sixteen black employees as to their difficulties in securing a higher-paying job in the plant, and there was evidence of favoritism for white employees, frequently based on family or personal relations. See 706 F.2d at 1386, A6. And most significantly, the Plant Manager—the official with the principal role in making job assignments at the sawmill—testified to his belief that blacks were not suitable for and did not want more responsible positions. His testimony in this regard is reprinted in the opinion of the court of appeals, 706 F.2d at 1390-91, A14-15.

out reference to possible differences in qualifications. See pp. 8-9, *infra*. Lastly, the court of appeals held that the number of specific job assignments considered by the Magistrate—even assuming the correctness of his conclusion that these assignments were shown to be nondiscriminatory—was too small to overcome the inference of discrimination that arose from plaintiffs' evidence. See pp. 9-10, *infra*.

The correctness of the decision of the court of appeals on these questions is discussed in Part 3, *infra*. What is significant here, in terms of the question purportedly presented by the Petition, is that the court of appeals overturned conclusions of law, not findings of fact.

In arguing that the court of appeals did reverse factual findings in violation of the teaching of this Court's decision in *Swint*, defendant claims that here, just as in *Swint*, the court of appeals reversed a lower court finding that there was no intent to discriminate. But the two situations are not the same.

Swint involved the application of Section 703(h) of Title VII which immunizes a seniority system from liability under the Act, even if it perpetuates past discrimination or has a disproportionate adverse impact on a protected group, unless the plaintiff proves that the seniority system was adopted with the intention to discriminate on a prohibited basis. See generally *Teamsters v. United States*, 431 U.S. 324, 349-353 (1977). Intent to discriminate in the adoption of a seniority system cannot be inferred from the fact of disparate impact; plaintiff must adduce evidence that is probative of actual discriminatory motivation. *Pullman-Standard Co. v. Swint*, 456 U.S. at 289. In *Swint*, this Court held that whether such motivation exists is a pure question of fact to which Rule 52 applies.

The case at bar does not involve a seniority system. Rather, plaintiffs alleged class-wide disparate treatment of blacks in assignments to upper-level jobs at defend-

ant's sawmill. This Court has held that a *prima facie* case of class-wide disparate treatment, including the element of intent to discriminate, is established by proper statistical evidence that shows significant disparities adverse to a protected group. *Teamsters v. United States*, 431 U.S. at 339; *Hazelwood School District v. United States*, 433 U.S. at 307. Similarly, a *prima facie* case of individual disparate treatment, including the element of intent to discriminate, is established by proof of the four elements set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A district court's refusal to find a *prima facie* case of discrimination, in either a class or individual action, when the facts identified by this Court as establishing a *prima facie* case have been proved, is not a factual finding protected by Rule 52.

3. The Decision of the Court of Appeals on the Legal Questions Presented Was Fully in Accord With the Decisions of This Court.

A. The Number of Employee Assignments Reflected in Plaintiffs' Statistical Evidence Was Large Enough for Significance.

Plaintiffs' statistical tabulations with regard to the initial job assignments of new employees included initial assignment information for 761 new hires. It showed 112 initial assignments to upper-level jobs. Plaintiffs' statistical analysis regarding promotions included information for 335 employees. It showed 126 promotions to upper-level jobs.[5]

In holding that the disparities shown in plaintiffs' tabulations were sufficient to give rise to an inference of discrimination, the court of appeals relied on the methodology adopted by this Court in *Castaneda v. Partida*, 430 U.S. at 496, n.17, and applied to actions under Title VII

[5] See note 3, supra.

in *Hazelwood School District v. United States*, 433 U.S. at 311, n.17.[6]

> Plaintiffs' reliance on statistical evidence to prove a *prima facie* case of racial discrimination requires us to judge the statistical significance of the disparities charted above. Fortunately, the methodology to be utilized in arriving at this answer is clearly set out in *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). A binomial distribution statistical analysis of Tables I (initial assignment data) and VI (promotion data) demonstrates the statistical significance of the difference between the actual and expected number of blacks who received favorable initial assigments/promotions.

706 F.2d at 1391, A15. Footnote 3 to the opinion of the court of appeals sets out the mathematics for the approved binomial distribution statistical analysis for Tables I and VI. The determination of significance necessarily includes consideration of the number of observations involved.

B. Where Prior Qualifications Are Not Required, Statistical Evidence Need Not Include Qualifications to Raise an Inference of Discrimination.

The Magistrate also thought that plaintiffs' Tables I and VI were insufficient to raise an inference of discrimination because they did not account for possible differences in the qualifications of black and white employees. A67.[7]

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[6] Defendant's argument, Petition, pp. 13-15, that a binomial distribution analysis is acceptable in jury selection cases, but not in employment discrimination cases, is foreclosed by this Court's decision in *Hazelwood School District v. United States*, which is not cited in the Petition.

[7] Plaintiffs did introduce statistical evidence that was standardized for prior experience. In preparing these exhibits, the relevance of each individual's prior experience, as shown on his employment application, was determined according to objective standards developed by plaintiffs' counsel. See 706 F.2d at 1391, & n.4, A17 & n.4.

[Footnote continued on page 8]

At trial, the Manager of the sawmill testified that there were no prior experience requirements for assignment to the upper-level jobs at the plant and that employees learned how to do these jobs through on-the-job training. See 706 F.2d at 1392, & n.5, A17-18 & n.5. In holding that the Magistrate had erred in rejecting plaintiffs' statistical evidence for failure to consider pre-employment qualifications, the court of appeals relied directly on the decisions of this Court in *Teamsters v. United States* and *Hazelwood School District v. United States.*

> Defendant points to a line of cases in which the failure to standardize data for qualifications was judged fatal to the plaintiffs' statistical case. E.g., *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982); *Rivera v. City of Wichita Falls* [,665 F.2d 531 (5th Cir. 1982)]. Unlike the case at bar, however, those cases considered jobs involving skills not generally possessed or readily acquired by the general population. The Supreme Court, in *Hazelwood School District v. United States*, set forth the reason that the two types of cases must be viewed differently.
>
> > In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the

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[Continued]

These exhibits, which appear as Tables II, V, VII and IX in the opinion of the court of appeals, 706 F.2d at 1388-90, A10-A13, confirm the inference of discrimination.

Defendant took the position at trial that plaintiffs did not correctly determine what sort of prior experience is relevant to work in a sawmill, but it did not produce any alternative statistical analysis that would reflect its own view of relevant prior experience.

> smaller group of individuals who possess the necessary qualifications) may have little probative value.
>
> 433 U.S. at 308 n.13. Since the plant manager plainly stated that all but one of the jobs could be learned on the job, . . . qualifications need not be considered in making an accurate statistical picture.

A19-20.

C. The Evidence on Which the Magistrate Relied Was Too Narrow to Overcome the *Prima Facie* Case.

The Magistrate reached the conclusion that any inference of discrimination that arose from plaintiffs' proof had been overcome on the basis of evidence adduced by the defendant that identified the individuals who had worked in the jobs in which few or no blacks had worked.[8] In many instances, there was no evidence or finding that these whites possessed any special qualifications for these jobs, and no explanation as to why they had been so assigned. A44-A55. In the course of this discussion, the Magistrate examined a small handfull of specific selection decisions as to which black employee witnesses had alleged discrimination, and found that these were all non-discriminatory. *See* A47, A49, A54.[9]

In reversing, the court of appeals held that evidence concerning a few assignments was legally insufficient to overcome a *prima facie* case that includes statistical evidence bearing on hundreds of employment decisions.

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[8] Plaintiffs' Table III listed eighteen higher-paying jobs in which a total of 78 whites and no blacks had worked. 706 F.2d at 1388, A10. More than 40% of the persons employed at the sawmill were black. A31.

[9] With respect to the instances in which the Magistrate found a particular assignment decision to be non-discriminatory, plaintiffs argued in detail and at length on appeal that the findings were clearly erroneous and should be overturned. The court of appeals did not address this argument because it found that evidence relating to the filling of a few vacancies was inadequate to overcome the *prima facie* case, regardless of the correctness of the Magistrate's findings relating to these vacancies.

> [Defendant presented] evidence about a few of the promotion decisions and why blacks were not placed in these positions. This attempt to combat a *prima facie* case with evidence about a handful of promotion decisions is doomed to failure because a *prima facie* case of class-wide discrimination "is not met by [defendant's] attempts to parry specific allegations of alleged discrimination. . . ." *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972). . . .

706 F.2d at 1393, A20. Defendant acknowledges that this correctly states the applicable legal principles. Petition, p. 9.

4. The Court of Appeals' Decision on Class Certification Is Correct.

The case was filed as a class action in August 1973. On December 27, 1974, the district court certified the case as a class action on behalf of present and former black employees for purposes of discovery and trial, and ordered that notice of the action be mailed to each member of the class.[10] Discovery was conducted on a class-wide basis, the class issues were fully explored at trial and were decided by the Magistrate.

In his Recommendation, the Magistrate ruled that the class should be decertified because of "lack of a proper representative of the alleged class and the absence of proof of sufficient numerosity to necessitate the filing of a class action." A61. With respect to the first point, the Magistrate cited plaintiffs' status as former employees. A62. With respect to the latter, the Magistrate stated that the sixteen employee witnesses who testified at trial could have each brought their own action. A62-63.

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[10] The Petition, p. 4, is in error in stating that the original tentative certification was by the Magistrate. In fact, it was entered by Judge Russell on December 27, 1974. The Magistrate was appointed as Special Master on March 30, 1976, and had no prior involvement with the case.

The individual plaintiffs are black men who were hired by defendant and assigned to the lowest-paid classification at the sawmill. During their employment with the defendant, neither was able to secure a promotion to a higher-paid job. Individually, they claim to be victims of defendant's policy of racially discriminatory initial assignments and promotions. Thus, there is a complete identity between the individual and class claims. The case presents no question of a representative raising claims different from his own. *Compare General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).[11]

Plaintiffs' status as former employees in no way undermines the propriety of their representation. To the contrary, former employees comprise a substantial majority of the members of the class.[12] No question has ever been raised as to the adequacy or vigor of plaintiffs' representation of the class as originally certified by Judge Russell nine years ago.

With respect to numerosity, the Magistrate counted the number of witnesses, instead of the number of individuals affected by the challenged employment practices. Plaintiffs proved that 295 blacks were assigned to utility positions from 1970 to 1976.[13]

The Magistrate's Recommendation for class decertification was manifestly erroneous and its reversal by the court of appeals was proper in all respects.

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[11] The Magistrate recommended dismissal of both the individual and class claims. After reversing the Magistrate's disposition of the class claims, the court of appeals held that "[t]he named plaintiffs, as every other black employee in the class, are entitled to the presumption that arises from the finding of discrimination and should be entitled to make a claim for back pay and other relief." 706 F.2d at 1394, A22-23. Thus, this is not a case in which a plaintiff whose individual claim has been determined to be without merit is permitted to represent a class. *Compare East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

[12] See note 3, *supra*; A31.

[13] See note 3, *supra*.

CONCLUSION

The defendant has failed to identify any question that would warrant the exercise of *certiorari* jurisdiction by this Court. The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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